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Supreme Court of the United States

OCTOBER TERM, 1961

No. 331

THE SHELL PETROLEUM CO., LTD.,
as owner of the m/s LEMBULUS,
Petitioner,

—against—

CHARLES PESCHKEN,
Respondent,

and

CANOLIUS V. HINES and
FRED W. BENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1961

THE SHELL PETROLEUM CO., LTD.,
as owner of the m/s LEMBULUS,
Petitioner,

—against—

CHARLES PESCHKEN,
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and

CANOLIUS V. HINES and
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No. .....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review the judgment of that Court filed on May 23, 1961, reversing the judgment of the District Court in favor of petitioner and remanding the case to the District Court with directions to enter judgment in favor of respondent.

Opinions of the Courts Below

The opinion of the District Court is reported at 184 F. Supp. 950 (D. C. N. J., 1960) and is reproduced in Appendix A. The opinion of the District Court denying motion

for judgment in favor of respondent notwithstanding the Court's opinion filed on June 24, 1960, is not officially reported but is reproduced in Appendix B. The opinion of the Court of Appeals is reported at 290 F. 2d 685 (3 Cir., 1961) and is reproduced in Appendix C.

Jurisdiction

The judgment of the Court of Appeals was filed on May 23, 1961.

Jurisdiction of this Court is invoked under Title 28 U. S. C. 1254 (1).

Questions Presented

1. Whether the rule in the *Pennsylvania* case, 86 U. S. 125, applies to violations of the Bridge Act of 1906 in (a) maintaining and operating a defective bridge contrary to the provisions of 33 U. S. C. 494, 33 U. S. C. 499, 33 U. S. C. 512 and (b) in invariably sounding the wrong signal, contrary to the provisions of 33 C. F. R. 203.200 (a), (d) and (e), to every vessel approaching the bridge.

2. Whether (a) maintaining and operating a defective bridge and (b) customary disregard of the Corps of Engineers' regulations as to signals constitutes an unlawful obstruction to navigation.

3. Whether a bridge tender's act of customarily violating the provisions of 33 C. F. R. 203.200 (a), (d) and (e), by sounding the wrong signal to every vessel that approaches the bridge, can be used to avoid or evade regulations designed to protect the rights of public navigation, and whether the bridge tender's act can be used to transform the ancient and well established paramount right of

public navigation into a paramount right to maintain an obstruction to public navigation.

4. Whether the Circuit Court, in completely reversing the District Court, was correct in not applying the principles enunciated by other Circuit Courts in *Clement* v. *Metropolitan West Side El. R. Co.*, 123 Fed. 271 (7 Cir., 1903), *The Majestic*, 80 F. 2d 879 (4 Cir., 1936) and *Munroe* v. *City of Chicago*, 194 Fed. 936 (7 Cir., 1912), cert. den., 229 U. S. 609, and a line of cases predicated thereon, which decisions were cited and followed by the District Court.

5. Whether the Court of Appeals was correct in its interpretation of a two-blast signal as a "warning" and that no other signal was necessary to give proper warning of a potential electrical failure, a holding contrary to the holding in *Circle Line Sightseeing Yachts* v. *City of New York*, 283 F. 2d 811 (2 Cir., 1960), and whether the Circuit Court, in reversing the District Court as a matter of law, was in reality upsetting findings of fact made by the District Court which findings were amply supported by the evidence.

Regulation Involved

33 C. F. R. 203.200 (a), (d) and (e)

§ 203.200 *Newark Bay, Passaic and Hackensack Rivers, and their navigable tributaries; General Regulations.* (a) The draws shall be opened promptly, upon signal, for the passage of vessels during the day or night, except as prescribed in paragraphs (b), (c), or (f) of this section.

* * *

(d) When a vessel approaches within signaling distance of a bridge for passage, the master thereof shall signify his intention by three blasts of a whistle or horn. For those

bascule bridges that have two separate and distinct drawspans the approaching vessel shall signal for an opening of the bridge in the customary manner by three blasts of a whistle or horn, and this shall be followed after a short interval with one blast, if it is desired that the drawspan on the starboard hand as the vessel approaches be opened, or by two blasts if it is desired that the one on the port hand be opened. The signal of the craft shall be immediately answered by the tender or operator of the bridge. If the draw is ready to be immediately opened, the answer shall be three blasts of a whistle or horn from the bridge. In case of delay in opening the draw, as is provided for in this section, or as may be necessary by accident to the machinery or other contingency, the signal from the vessel shall be answered by two long blasts of a whistle or horn from the bridge. In all cases when delay signals have been given, a signal of three blasts of a whistle or horn shall be given as soon as it is possible to open the draw.

(e) Upon hearing or perceiving the signals prescribed, the tenders or operators of a drawbridge, except as provided in paragraphs (b), (c) and (f) of this section, shall at once open the draw signaled for so as to allow the prompt passage of any vessel or craft: *Provided,* That the bridge may not be opened when there is a train, wagon, or vehicle at the time passing over said drawspan, or a train approaching so closely that it cannot be safely stopped before reaching the bridge, but it shall be opened as soon as the drawspan can be cleared. In case the opening of the draw will be delayed under the provisions of paragraph (c) of this section the tug stationed at the draw shall immediately go to the assistance of the vessel.

Statutes Involved

Bridge Act of 1906

33 U. S. C. 494; 33 U. S. C. 499; 33 U. S. C. 512

§ 494. Obstruction of navigation; alterations and removals; lights and signals; draws; tolls.

No bridge erected or maintained under the provisions of sections 491—498 of this title, shall at any time unreasonably obstruct the free navigation of the waters over which it is constructed, * * *

* * *

§ 499. Regulations for drawbridges; penalties for violation; enforcement.

It shall be the duty of all persons owning, operating, and tending the drawbridges built prior to August 18, 1894, or which may thereafter be built across the navigable rivers and other waters of the United States, to open, or cause to be opened, the draws of such bridges under such rules and regulations as in the opinion of the Secretary of the Army the public interests require to govern the opening of drawbridges for the passage of vessels and other water crafts, and such rules and regulations, when so made and published, shall have the force of law. * * *

* * *

§ 512. Obstruction of navigation.

No bridge shall at any time unreasonably obstruct the free navigation of any navigable waters of the United States. (June 21, 1940, ch. 409, § 2, 54 Stat. 498.)

* * *

Statement of the Case

This is a proceeding in admiralty which came on for trial before Hon. Reynier J. Wortendyke, Jr. in the United States District Court for the District of New Jersey on the 2nd, 3rd, 4th and 9th days of May, 1960. The parties were heard upon their respective pleadings and proofs and their cases were briefed and submitted to the Court which, after due deliberation thereon, filed its written opinion on June 24, 1960, holding respondent Charles Peschken liable for damages sustained on December 20, 1957, by petitioner's vessel, the m/s LEMBULUS.

Respondent thereafter moved the Court for judgment in his favor notwithstanding the Court's opinion, for an order "setting aside the verdict" and for a new trial. The motion was heard on September 26, 1960, and the Court's opinion denying the motion was filed on October 26, 1960. An interlocutory decree was filed on November 3, 1960, granting judgment in favor of petitioner and appointing a commissioner to ascertain damages.

Respondent appealed to the United States Court of Appeals for the Third Circuit. The appeal was argued on May 2, 1961. The Court of Appeals' opinion was filed on May 23, 1961, reversing the District Court and remanding the case with directions to enter judgment in favor of the respondent.

It should be noted at the outset that the Court of Appeals has loosely and incorrectly labeled a customary two-blast signal from the bridge as a "warning signal" (4c).* That signal is referred to in the Engineers' regulations as a "delay signal" (2f). The warning signal for Lincoln Highway Bridge is prescribed by the New Jersey State Highway Department and consists of two blasts to

*All references unless otherwise noted are to petitioners' appendix, attached hereto.

be repeated at intervals (Exh. P 13c, 1f), and this warning signal was never given. Furthermore, the State of New Jersey's regulations,* rule 3, requires three blasts to be given when the span *starts* to rise (Exh. P 13c, 1f), which is consistent with the Engineers' regulation.

A recent case involving the Madison Avenue Bridge, New York, N. Y. illustrates an entirely different application of the same type of whistle signals. *Circle Line Sightseeing Yachts* v. *City of New York*, 283 F. 2d 811 (2 Cir., 1960). The bridge in that case is governed by 33 C. F. R. 160. Paragraph (d) provides for whistle signals using the same two and three blasts signals made applicable to the Hackensack River Bridge by 33 C. F. R. 200 (d).

A sightseeing yacht, with hundreds of persons aboard, was approaching the bridge and expected to pass under the bridge in its usual fashion. The regulations required the Sightseer VIII to sound a three blast signal indicating her intention to pass. However, a tug had already signaled the bridge and the bridge was about to be opened. The Sightseer VIII could safely pass under the bridge while closed, but not while the bridge was opening because the act of opening the bridge caused certain objects on the bridge to project in such a manner as to obstruct passage.

In that situation a two blast reply from the bridge would not be a warning signal at all. In fact, it would be tantamount to an invitation to the Sightseer VIII to proceed because the signal would indicate that the bridge was closed and, therefore, the vessel could pass safely under the closed bridge. The Court of Appeals held that some-

*Although two written requests were made, the Office of the Attorney General of the State of New Jersey, who represents the respondent, has not produced Exhibit P-5 for identification, which is a book of Rules and Regulations of the New Jersey Highway Department governing drawbridges, and therefore the Rules themselves cannot be reproduced in the appendix. A photograph however of five of said rules is reproduced in appendix F.

thing other than the two or three blast signal should have been devised as a warning signal.

The State of New Jersey recognized that the two-blast signal, by itself, was not a warning and the State supplemented the regulations by adding a warning signal, namely, that the two blast signal was to be repeated at intervals.

The State of New Jersey also recognizes that a vessel can properly proceed towards the Hackensack River bridge while the span is in upward motion. Rule 3 clearly states (Exh. P 13c, 1f): "On vertical lift bridges, three blasts of the siren are to be given * * * when the span starts to rise, and the operator shall *continue to raise the span until the boat enters the draw* * * *."

Furthermore, as will be discussed in cases cited below, the Fourth, Sixth and Seventh Circuits hold that a vessel may proceed towards a bridge exhibiting a red light anticipating that the bridge would be opened in sufficient time for safe passage.

The Court of Appeals also characterizes (3c) a two-blast signal as a "command" which was allegedly "disobeyed" by the LEMBULUS. The only command to the LEMBULUS contained in 33 C. F. R. 203.200 (d) is that she shall give a three blast signal upon approaching the bridge and that command was complied with. The LEMBULUS did not disobey any command. To the contrary, it was the respondent who "disobeyed" a command in that he customarily gave a two blast signal regardless of whether the bridge could or could not open.

It appears that in considering the LEMBULUS case, the Third Circuit's basic assumption that a two blast signal is an absolute warning and a directive to the LEMBULUS not to proceed, so colored the Court's approach to the appeal that it either could not or would not consider any other factors such as whether the vessel was capable of being physically stopped dead in the water immediately after receipt of the signal; whether those aboard the LEMBULUS had done

all they could reasonably do to both avoid the collision and also avoid running aground under prevailing weather conditions by having placing her engines on slow ahead, dead slow ahead and stop; whether the vessel was legally required to take off all headway; whether the LEMBULUS's rights of navigation had been encroached upon and whether the *Pennsylvania* rule applies to bridges.

It is to be noted that the Circuit Court made no reference at all to whether the *Pennsylvania* rule applies to infractions of law by bridges or bridge tenders. The only reference by the Court of Appeals related to whether it would apply the *Pennsylvania* rule to the vessel.

It also seems strange indeed that the Circuit Court did not cite or discuss any cases involving collisions between bridges and ships. The Circuit Court stated that the cases cited by the District Court could be distinguished, but the Circuit Court made not the slightest effort to do so. If the Court of Appeals had discussed the authorities cited by the District Court, and in fairness we think it should have, then we believe that the discussion would have invariably lead to a consideration of the rights of navigation versus the questionable right to maintain and operate a defective bridge.

Facts

The LEMBULUS, a motor tanker 446 feet 2 inches length, 54 feet 7 inches in breadth, 25 feet 7½ inches loaded draft and 6,503 gross tons,* arrived at Sewaren, New Jersey, on December 16th, 1957, with a full cargo of roofing asphalt from Curacao, Dutch West Indies. After discharging some asphalt to lighten the vessel for navigation up the Hackensack River, she proceeded to Kopper's Wharf, Kearney Point, New Jersey where the balance of cargo was discharged. Discharging was com-

*Data taken from Lloyd's Registry.

pleted on December 20, 1957, following which the vessel ballasted and prepared for her return trip to Curacao. Captain John Bassett, a Moran Towing Company Docking Master and Harbor Pilot, boarded the LEMBULUS to pilot her down the Hackensack River.

The vessel's draft was 13' 00" forward and 17' 00" aft. Fresh to strong squally southeasterly winds prevailed with intermittent rain showers. The voyage down the Hackensack River was uneventful until just prior to passage under the Lincoln Highway Bridge. On passing under City Bridge (also referred to as the Whitpen Bridge) at 1546, Captain Bassett signaled the bridge to open. The Lincoln Highway Bridge in turn acknowledged the LEMBULUS's signal and, in fact, commenced to rise. Captain Hawkins, Master of the LEMBULUS, testified (Exh. P 10, 2i) that the bridge continued:

> "* * * to rise and everything seemed to be proceeding normally. At 1555 hours it was noticed that the bridge had stopped rising and a movement of Dead Slow Ahead which had just been made was immediately followed by, Stop. At 1556 hours the vessel was in an impossible position right in the approach to the bridge before we began to have doubts of the masts clearing, and Full Speed Astern was rung on the engines in an an attempt to take the way off. This movement was followed by, Stop (not recorded in the Bridge Movement Book), and immediately afterwards by, Emergency Full Speed Astern. The foretopmast hit the bridge at this time and a few moments later the maintopmast hit too. After the foretopmast hit, the bridge resumed rising and continued to apparently rise to the fully lifted position after we had passed through. At 1603 it was noted that the bridge had been fully lowered to the closed position. The foretopmast hit the bridge about six feet below the truck and the maintopmast about four inches below the truck. These figures were quoted in the Official Log Book Entry, made after the accident but, when

> the masts were removed in the repair yard the measurements were found to be nine feet ten inches and six inches respectively."

Captain Hawkins continued in his report, almost intuitively for he could have no knowledge of what took place in the control room of the highway bridge, that:

> "* * * Regarding the stop in the rising movement of the bridge, it may be that there was some temporary mechanical fault in the lifting mechanism but, at no time did the bridge operators give any indication that there was anything amiss. The bridge is fitted with a warning whistle for such emergencies."

Repairs were effected at the Bethlehem Steel Company's yard in Staten Island after which the LEMBULUS resumed her voyage to Curacao on December 23, 1957.

Libelant filed a libel against the respondent* to recover damages resulting from his negligence and breach of a statutory obligation under the Bridge Act of 1906, and Corps of Engineers' regulations adopted pursuant thereto, in failing to raise the Lincoln Highway Bridge high enough, soon enough for safe passage of the LEMBULUS and without warning to the vessel.

The bridge tender testified at the trial that, regardless of the Engineers' or the State Highway Department's regulations governing the operation of bridges, he always sounds a two blast signal when he starts to raise the span rather than the three blast signal required by law. Respondent was asked, with respect to the fact that he invariably

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*Suit was also filed against two other bridge personnel as a precautionary measure but at the conclusion of the trial petitioner suggested to the Court that, because those two respondents did not operate the controls and were not responsible for giving signals, "an honest reading of the evidence does not seem to warrant a finding of liability" on their part. The libel was accordingly dismissed as to them.

replies with two blasts to a vessel's signal of three blasts (20h):

> "Q. And you testified that, in fact, you do not observe that regulation as a matter of course?
> A. That's right."

Respondent is not alone in his attitude toward answering all vessels with a two blast signal regardless of whether the span can be raised or not. Perhaps his attitude derives from a general attitude in the New York-New Jersey area. For instance, the "Departmental Rules on Openings" of bridges operated by the City of New York are prefaced with the comment (1e) that "These rules are in conformity with the regulations prescribed by the Department of the Army, for the draw bridges in this section" and provides that:

> "All call signals for openings shall be answered promptly by the bridge by 2 long distinct blasts."*

Whatever the reason may have been for respondent's disregard of the regulations, the fact remains that he invariably replied to a vessel's call signal with two blasts.

The District Court stated (17a):

> "* * * I find that by commencing the raising of the drawspan immediately following his 'warning' signal, the physical raising of the bridge countered the effect of such warning, and served as an invitation to the vessel to proceed. See *Clement* and *The Kard,* supra. I can, therefore, find no basis for concluding that the vessel contributed in bringing about the collision, and am unable to relieve the draw bridge operator of responsibility for the occurrence."

It should be noted that the District Court found as a fact that the reduced speed of the LEMBULUS did not contribute to the accident and that the situation appeared

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*Cf. *Southern Transp. Co.* v. *City of New York,* 98 F. Supp. 967 (S. D. N. Y., 1950) where at page 969 the court said such signal is "contrary to the regulations of the War Department."

normal to those aboard said vessel (3b). These findings were amply supported by the evidence.

Captain Walfrid Waxin, master of the tug Cathleen Moran, was in a good position, astern of the LEMBULUS, to observe the bridge as it went up. Captain Waxin testified (13h):

> "I saw the bridge start to rise to what appeared to me to be in the usual fashion of bridges rising. Then to slow down to such an extent that it was hard to tell whether the bridge was still rising or had stopped."

With respect to the LEMBULUS's speed, Captain Waxin testified (14h):

> "* * * it (the LEMBULUS) seemed to me to be moving very slowly, but I wouldn't guess at any actual speed."

Captain Hawkins, master of the LEMBULUS, testified that the LEMBULUS was approximately one ship length away from the bridge abutment when the span suddenly stopped rising, and prior to that time the span had been moving upward continuously from the time it first started to move until it stopped (8h).

While the situation appeared to be and was normal to those aboard the LEMBULUS, the bridge was in fact defective in that it was being operated while subject to sudden power failure. Respondent and a Mr. Jerry Iannaccone, the District Electrical Supervisor, "decided" to operate the bridge until the trouble was located. The defect was not reported to the Coast Guard for publication in Notice to Mariners (19h) and was only verbally reported to Mr. Iannaccone's superior. The difficulty was subsequently located in the control mechanism. The bridge has a leveling mechanism to keep the span level as it rises, and if the span became sufficiently out-of-level the mechanism automatically stops the span from rising further (18h).

Respondent, with actual knowledge that the span was subject to sudden stoppage while rising, testified that the procedure he followed was "normal in every respect" and there was nothing "abnormal" (16b) about it.

Stated in other words, the Lincoln Highway Bridge operators did nothing, absolutely nothing out of the ordinary—upon receipt of the LEMBULUS's signal—to advise or warn of anything unusual.

The District Court summed up its findings (2b-3b):

> "The continued use of the defective draw span elevating mechanism by the New Jersey State Highway Department was negligent on its part, and the knowledge of the persistence of that defect had been brought home to the bridge operator and the likelihood of a slow-up or stoppage in the opening of the draw was apparent to him. There is no evidence that the master of the vessel or her pilot had knowledge either of the defect or of the regulations adopted by the Highway Department with regard to the giving of warning signals, and therefore the vessel was entitled to rely upon the regulations promulgated by the Secretary of the Army, from which I have quoted in my filed opinion. Assuming as true the bridge operator's testimony that he gave a two-blast signal in response to the three blasts from the vessel, the commencement of the opening of the draw almost immediately thereafter and its obvious continuance, without further warning signal until the vessel was so close as to be unable to stop her forward movement, constitutes, in my opinion, negligence on the part of the bridge operator which was solely responsible for the collision complained of. In sum, the commencement of the opening of the draw so promptly after the two-blast signal under the weather conditions which existed at the time, coupled with the continued rise of the draw span without further warning signals until collision was inevitable, constituted a reliable invitation on the part of the bridge operator to those in charge of the vessel's navigation to proceed and to expect

> that when the vessel entered the draw the span would have reached an elevation permitting her masts to pass beneath it without contact. I do not find that the vessel's speed played any part in bringing about the collision."

The weather conditions to which the District Court referred are:

> "The wind was fresh to strong from the southeast, and squally, with intermittent rain showers, and there was an incoming tide." (4a)

As heretofore noted, the ship was in ballast—i.e.—riding high in the water and subject to the wind.

The width of the channel, as distinguished from the width of the river, is about 400 feet at the approaches to the bridge (Exh. P 2, 1j), which is less than a shiplength.

The Court of Appeals, ignoring the realities of the situation and the lower Court's findings of fact, reversed the District Court *en toto* and directed entry of judgment in favor of respondent.

REASONS FOR GRANTING THE WRIT

1. The decision by the Court of Appeals for the Third Circuit is in conflict with a decision by the Court of Appeals for the Fourth Circuit in *The Majestic*, 80 F. (2d) 379 (4 Cir., 1936) and is in conflict with the leading decision on this subject by the Court of Appeals for the Seventh Circuit in *Clement* v. *Metropolitan West Side El. Ry. Co.*, 123 Fed 271 (7 Cir., 1903) and *Monroe* v. *City of Chicago*, 191 Fed. 936 (7 Cir., 1912), cert. den. 229 U. S. 609. It also conflicts with the decision of the Sixth Circuit in *City of Cleveland* v. *Melver*, 109 F. 2d 69 (6 Cir., 1940).

The Court of Appeals' decision in this case was based solely on the exchange of whistle signals. After referring to the fact that the LEMBELUS gave a proper signal to the bridge indicating her intention to pass, the Court said (2c):

> "* * * This signal was answered by two blasts from the bridge. It may be that this two-blast signal was repeated by the bridge but the court made no finding to this effect and whether a second two-blast signal was given is not material to our determination of this case. At the time the bridge answered the ship with the two-blast signal those in charge immediately began the process of opening the draw. No one from the bridge gave a three-blast signal which would have indicated to the ship that she could come ahead. * * *"

and repeated the substance of the foregoing (4c):

> "* * * Peschken, operating the Lincoln Highway Bridge, did give the warning signal. Perhaps he gave it twice*. And no three-blast 'come ahead' was given. The ship is clearly at fault. * * *"†

The Court of Appeals thus predicates its holding the LEMBULUS entirely and solely at fault upon proceeding towards the bridge, regardless of any other factor considered by the District Court, after the bridge gave a single two blast signal and immediately commenced rising the span. That holding is entirely *contra* to the decision in the *Majestic,* 80 F. (2d) 879. In the *Majestic* case a tug was approaching a bridge and gave a signal that it wished to pass through the draw. At that time a red light was showing on the bridge. The red light remained fixed as the tug approached the bridge. It appears that the tug could have been held in check waiting for the light on the bridge to turn green but, relying on the custom of the bridge, the tug proceeded. It also appeared that the bridge

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*There is no finding by the District Court that those aboard the LEMBULUS heard a two-blast "warning" signal and certainly no finding that a second signal was sounded to or heard by those aboard the vessel.

†No authorities are cited for this proposition and not one single ship-bridge collision case was discussed.

sounded a one blast signal intended as a warning to pedestrians that the span was about to be lifted, and that the tug master probably understood the meaning of the signal.

The Army Engineers' regulations governing the operation of that bridge provided that when the bridge exhibited a red light vessels were to stop and tie up before reaching the bridge. Vessels could proceed when the bridge showed a green light.

The light on the bridge was at all times red and a green light was never shown.

The District Court held that the accident was caused solely by the bridge tender's negligence and the Court of Appeals concurred.

In the instant case the LEMBULUS did not have the same option as the tug in the *Majestic* case, because the LEMBULUS could not tie up or anchor and, furthermore, there was a strong wind blowing across the channel.

The tug master in the *Majestic* case heard a signal, although not a navigational signal, by the bridge tender to pedestrians indicating that the span was about to be raised. In the instant case, those aboard the LEMBULUS actually saw the span being raised and, therefore, had an even firmer basis for believing that the span would be raised.

A similar decision was rendered by the Court of Appeals for the Seventh Circuit in *Munroe* v. *City of Chicago,* 194 Fed. 936 (7 Cir., 1912), cert. den., 229 U. S. 609. The steamer MARKHAM was bound up the Chicago river and signaled to a bridge. Her captain could see two red lights in the center of the bridge. The lights were placed on the bridge pursuant to regulations of the Lighthouse Board under the direction of the Department of Commerce and Labor. The lights showed red when the bridge was closed and green when open. At the time of the accident the bridge

was closed and the lights were red. In addition, there was no indication whatever that the bridge would be opened.

The District Court dismissed the libel. The Court of Appeals reversed, holding that a vessel, having given a proper signal and absent a specific warning, has the right to approach a bridge—even with a red light showing—with the expectation that the bridge would open in sufficient time to permit passage.

The Court of Appeals in the *Munroe* case made reference to an ordinance of the City of Chicago requiring a signal light to be shown when the bridge could not be opened and stated that, *inter alia*, the city was liable for not having provided and given a warning signal. It is interesting to note that in the instant case rule 2 of the New Jersey Highway Department regulations provides (Exh. P 13c, 1f):

> "If opening is delayed abnormally due to traffic conditions or to failure of equipment, the signal of two blasts is to be repeated at intervals until the draw can be moved."

In this case respondent did not sound two blast signals at intervals and, therefore, it would be fair for those aboard the LEMBULUS to assume that everything was operating normally. In any event no warning was given to the LEMBULUS.

The Court in both the *Majestic* case and the *Munroe* case cited the leading case of *Clement* v. *Metropolitan West Side El. Ry. Co.*, 123 Fed. 271 (7 Cir., 1903). In that case the steamer F. H. PRINCE signaled the bridge that it intended to pass and thereafter proceeded towards the bridge. It appeared that the locks would not work and that (p. 272):

> "* * * no signal or warning to the approaching boat was given with respect to the difficulty, otherwise than by the *red signal light* or lights upon the bridge." (emphasis added)

A collision ensued.

The Court of Appeals discussed the rights and obligations of the parties using the following much quoted language:

> "A bridge spanning a navigable river is an obstruction to navigation tolerated because of necessity and convenience to commerce upon land. Such a structure must be so maintained and operated that navigation may not be impeded more than is absolutely necessary, the right of navigation being paramount. It is incumbent upon the owner that the bridge be so constructed that it may be readily opened to admit the passage of craft, and maintained in suitable condition thereto. It is also his duty to place in charge those who are competent to operate the bridge, to watch for signals, and to open the bridge for the passage of vessels, and for the performance of such delegated duty he is responsible. It is also his duty to equip the bridge with proper lights giving warning of the position of the bridge and of its opening and closing. If for any reason the bridge cannot be opened, proper signals should be given to that effect, such as will warn the approaching vessel in time to heave to. A vessel, having given proper signal to open the bridge and prudently proceeding under slow speed, has, in the absence of proper warning, the right to assume that the bridge will be timely opened for passage. She is not bound to heave to until the bridge has been swung or raised and locked, and to critically examine the situation before proceeding (City of Chicago v. Mullen, 54 C. C. A. 94, 116 Fed. 292), but may carefully proceed at slow speed upon the assumption that the bridge will open in response to the signal, and may so proceed until such time as it appears by proper warning, or in reasonable view of the situation, that the bridge will not be opened (Manistee Lumber Company v. City of Chicago [D. C.] 44 Fed. 87; Central Railroad Company of New Jersey v. Pennsylvania Railroad Company, 8 C. C. A. 86, 59 Fed. 192), when it becomes the duty

> of the vessel, if possible to stop, and, if necessary, to go astern."

As heretofore noted, respondent always replied with two blasts to a steamer's signal of three. The Third Circuit ignored this behavior. However, the Seventh Circuit in *City of Chicago* v. *Chicago Transp. Co.*, 222 Fed. 238 (1915), posed this question (239):

> "May the city, by posting a universal 'No', excuse itself from having bridge tenders on duty who shall answer a vessel's requests for passageway by giving promptly the information that is appropriate to the immediate occasion? We think not * * *."

The City of Chicago had enacted an ordinance forbidding vessels to approach its drawbridges while a red ball by day or a red light by night was displayed, and further provided that the ball or lantern was to be lowered when ready and willing to permit a vessel to pass but "at all other times such signals shall remain elevated."

The ordinance of the City of Chicago is, in principle, the same as the behavior of respondent Peschken in the present case. Mr. Peschken by always sounding two blasts has posted a "universal No". The Seventh Circuit ruled that a "universal No" was improper. The Third Circuit ruled differently. We believe that the Engineers' rules should not be so easily evaded or that a bridge tender can convert his obligation into a burden on navigation simply by sounding the wrong signal. The *City of Chicago* case was decided in 1915 after enactment of 33 U. S. C. 494, and the Court looked to the *Clement* case to determine the rights and obligations of the respective parties. Those rights and obligations were not even discussed by the Third Circuit.

The decisions in the *Clement* and *City of Chicago* cases, supra, were cited and followed by the Sixth Circuit in *City of Cleveland* v. *McIver*, 109 F. 2d 69 (1940).

The decision of Third Circuit, therefore, is in conflict with decisions of the Fourth, Sixth and Seventh Circuits and, upon considering the overwhelming weight of these authorities, the Third Circuit erred.

The Circuit Court, in addition to reversing the District Court, has now overruled the prior opinions of two District Courts in the Third Circuit. The KARD, 38 F. 2d 844 (E. D. Pa., 1927) followed the *Clement* and *Monroe* cases, and *Conners Marine Co.* v. *N. Y. & Long Branch R. R. Co.*, 87 F. Supp. 132 (D. N. J., 1950) followed the *Clement* case.

The Court of Appeals has thus in 1961 introduced uncertainty into an area where the law was once considered settled since about the time of the *Clement* case in 1903 or the *Monroe* case in 1912. The Third Circuit's decision is the first of its kind and this Court does not appear to have passed upon the question.

2. There is a conflict between the decision of the Court of Appeals for the Third Circuit in this case and the decision of the Court of Appeals for the Second Circuit in *Merritt-Chapman & Scott Corp.* v. *Cornell Steamship Co.*, 265 F. 2(d) 537 (1959) and the decision of the Court of Appeals for the Fourth Circuit in the *Fort Fetterman* v. *South Carolina State Hwy. Dept.*, 261 F. 2(d) 563 (1958), rehearing, 268 F. 2(d) 27, relating to the applicability of the *Pennsylvania* rule to violations of the Corps of Engineers' regulations governing the erection and maintenance of bridges.

The District Court found (2b) that:

> "The continued use of the defective draw span elevating mechanism by the New Jersey State Highway Department was negligence on its part, and the knowledge of the persistence of that defect had been brought home to the bridge operator and the likelihood of a slow-up or stoppage in the opening of the draw was apparent to him. * * *"

The State of New Jersey has not waived its sovereign immunity and therefore cannot be made directly responsible

for its negligence in failing to repair the bridge or for its breach of the Engineers' regulations pursuant to which the bridge was permitted to be erected and maintained.

Instead, it is necessary to proceed in the first instance against the bridge tender *in personam* and then, if judgment is obtained, to apply for a private bill or other form of relief. While the State's immunity from suit permits it to be lax in observing rules and regulations governing public safety, the fact remains that the bridge tender was actually operating a defective bridge and, as pointed out by the District Court, the act of operating a defective bridge is wrongful. The opening sentence of 33 C. F. R. 203.200 (d) commands that the draws "shall be opened promptly" and a similar command appears in paragraph (e) where it is required that the draws shall be opened "at once". It is obvious that respondent, by operating a defective bridge could not open the bridge "promptly" or "at once".*

It was equally wrong and, we submit, a violation of the Engineers' regulation for the bridge tender to always and habitually reply to a steamer's three blast signal with two. The habitual use of a two blast signal destroys the effectiveness of the Engineers' regulations for that habitual signal becomes, in effect, no signal at all and it certainly is no warning such as that assumed by the Court of Appeals.

The doctrine of *The Pennsylvania* was applied by the Court of Appeals for the Second Circuit in *Merritt-Chapman & Scott Corp.* v. *Cornell Steamship Co.*, 265 F. 2d 537 (1959) to a breach of a Coast Guard regulation requiring a warning light on a bridge. In that case the light on the bridge was inadequate and, although the District Court had held that it did not contribute to the collision, held the bridge was at fault for breach of a statutory obligation.

The same doctrine was applied by the Court of Appeals for the Fourth Circuit when the South Carolina State High-

*Operation of a defect also violates the mandates in 33 U. S. C. Sections 494, 499 and 512 against obstructing free navigation.

way Department deviated from a bridge design approved by the Army Engineers. *The Fort Fetterman v. South Carolina State Highway Department*, 261 F. 2d 563 (1958).

The Court of Appeals should have applied the rule in the *Pennsylvania* case to the breaches of statutory obligations by the bridge operator, and its failure to do so constitutes error.

3. The decisions of our Courts in cases such as these have wide applicability throughout the United States, especially those having jurisdiction over commerce on the major rivers and in seaports, and the cities bordering them. The decisions also affect the application of rules of federal regulatory agencies designed to safeguard life and property.

Literally thousands of tugs, barges and seagoing vessels transit bridges while transporting goods and products to all parts of the country. At the same time, trains and other vehicular and pedestrian traffic cross said bridges discharging their functions. Together they provide the means for distributing our commerce and have a direct bearing on our welfare. It is therefore important that the law governing the flow of traffic and commerce be settled so as to avoid disrupting this commerce, and to guard against loss of life or property.

The Corps of Engineers is not the only regulatory agency concerned with decisions of the federal courts. For instance, the United States Coast Guard is concerned with the licensing and discipline of mariners for safety of life and property. *In the matter of license no. 175273, etc., issued to Philip E. Thorpe, Decision of the Commandant, United States Coast Guard, Appeal No. 1184*, the Commandant reviewed an order by a Coast Guard Hearing Officer who suspended the license of the master of a vessel navigating a river in Cleveland. The Commandant, in

reversing the order of suspension, relied heavily upon the decisions in the *Clement* and *Munroe* cases and held that the master was not negligent in approaching a bridge contrary to a local ordinance prohibiting such approach without permission from the bridge.

The case is also important from the point of view of public safety. For instance, records in the *Circle Line Sightseeing Yachts* case, supra, indicate that 258 persons were aboard, 87 were injured, 32 persons—including 5 on stretchers—were taken to hospitals and one died.

The collision between the LEMBULUS and the Hackensack River Bridge was unfortunately not the last. We have been informed that the m/v PLATIDIA collided with that very same bridge on July 7, 1961. We understand that, once again, the bridge tender failed to give proper signals and delayed its opening. We understand that the attitude of a "universal No" still exists and is quite likely to continue existing so long as bridge operators feel that they can place the entire onus of an accident upon a vessel merely by twisting the meaning of the Engineers' regulations.

The general attitude of bridge operators, in the interest of public safety, needs and demands correction.

The regulations of the City of New York (1e), for instance, do not comply with the Engineers' regulations. It directs that two blasts shall always be given upon receipt of a signal from a vessel. The regulation itself says that three blasts shall be given if the bridge is ready to rise. The City, on the other hand, says that the three blast signal shall not be given until the span is completely raised. In that situation, according to the Court of Appeals, the signalling vessel must stop. It cannot proceed, except at its own risk, until it receives what the Court called a three blast "come on" signal.

The City of New York's interpretation of the Engineers' regulation is contrary to the plain wording of said regula-

tion and is contrary to the substantive rights of the parties as enunciated in the *Clement* and *Munroe* decisions, and can lead only to confusion and perhaps a more serious disaster than that of the sightseer VIII collision. That attitude can lead only to repetitions of the same type as the LEMBULUS or the m/v PLATIDIA on July 7, 1961, and more. The number of vessels transiting bridges throughout the nation every day is tremendous, the risk of collision is also tremendous where bridge tenders give the wrong signal—a "universal No."

4. The Court of Appeals erred in another important respect, namely, it upset findings of fact by the District Court contrary to the decision of this Court in McAllister v. United States, 348 U. S. 19.

The District Court found, in effect, that the respondents' two blast signal was in reality no warning at all and when coupled with the immediate lifting of the span in its normal fashion was, as a matter of fact, an invitation to the LEMBULUS to proceed. The Court of Appeals for the Fourth Circuit in *The Majestic*, 80 F. 2d 879 at page 881 treated a similar situation as a question of fact and affirmed the District Court. The Third Circuit should have done the same in this case.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that its petition for a writ of certiorari be granted.

August , 1961.

Respectfully submitted,

ROBERT M. JULIAN
Counsel for Petitioner.

APPENDIX A

Opinion of the District Court

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY
Civil Action, No. 793-59
IN ADMIRALTY

OPINION

THE SHELL PETROLEUM CO., LTD.,
as Owner of the M/S LEMBULUS,
Libelant,

vs.

CHARLES PESCHKEN, CANOLIUS V. HINES
and FRED W. BENTS,
Respondents.

Appearances:

McCARTER and ENGLISH, Esqs.,
By FRANCIS E. F. McCARTER, Esq.,
Proctors for libelant, and

ROBERT M. JULIAN, Esq. (New York Bar)
Of counsel for libelant.

DAVID D. FURMAN, Esq.,
Attorney General of New Jersey
By ALFRED P. D'AURIA, Esq.,
Deputy Attorney General
Proctor for respondents.

WORTENDYKE, District Judge:

This case properly invokes the Admiralty jurisdiction of this Court. The cause of action alleged in the libel

arises out of a collision between the British Motor Tanker Lembulus, owned by libelant, and the draw section of a New Jersey State Highway bridge over the Hackensack River, a navigable body of water of the United States, on December 20, 1957. The bridge is also locally known as the Lincoln Highway bridge, and extends between Jersey City and Kearney, New Jersey. The respondents were employees of the New Jersey State Highway Department, who were charged with and engaged in the performance of the duty of operating the highway drawbridge with the draw section of which the collision here involved occurred.

The Bridge Act of 1906, 33 U. S. C. § 499 provides that it shall be the duty of all persons operating and tending drawbridges built across the navigable rivers and other waters of the United States "to open, or cause to be opened, the draws of such bridges under such rules and regulations as in the opinion * * * of the Secretary of the Army the public interests require to govern * * * the opening of drawbridges * * * for the passage of vessels * * *, and such rules and regulations * * * shall have the force of law." Rules and regulations have been promulgated by the Secretary of the Army for the operation of the Lincoln Highway bridge and are to be found in 33 C. F. R. 203.200(d) and (e), which provide:

> "(d) When a vessel approaches within signaling distance of a bridge for passage, the master thereof shall signify his intention by three blasts of a whistle or horn. * * * The signal of the craft shall be immediately answered by the tender or operator of the bridge. If the draw is ready to be immediately opened, the answer shall be three blasts of a whistle or horn from the bridge. In case of delay in opening the draw, as is provided for in this sec-

> tion, or as may be necessary by accident to the machinery or other contingency the signal from the vessel shall be answered by two long blasts of a whistle or horn from the bridge * * *. In all cases when delay signals have been given, a signal of three blasts of a whistle or horn shall be given as soon as it is possible to open the draw.
>
> "(e) Upon hearing or perceiving the signals prescribed, the tenders or operators of a drawbridge, except * * * shall at once open the draw signaled for so as to allow the prompt passage of any vessel: * * *."

Other regulations promulgated by the New Jersey State Highway Department for the operation of the drawbridge provided that if the opening were delayed abnormally, due to traffic conditions or failure of equipment, "the signal of two blasts is to be repeated at intervals until the draw can be moved."

The evidence at the trial disclosed that the vessel had been moored at Kopper's Wharf on the westerly bank of the river at Kearney Point, New Jersey, some distance north of the Lincoln Highway bridge, discharging cargo. After cargo discharge, the vessel, in ballast, for a voyage to Curacao, Dutch West Indies, cast off from the wharf and proceeded downstream upon the river, followed by two tug-boats which had assisted in turning the vessel about after she cast off. She had been moored at the wharf port-side to, with the bow in an upstream direction. The Lembulus was 466 feet 2 inches in over-all length, had a beam of 54 feet 7 inches, and a loaded draft of 25 feet 7½ inches. Her gross tonnage was 6,503. In ballast, as she was upon her departure, her forward draft was 13 feet and her after draft 17 feet. She was clear of the wharf at 1529 hours on

the date stated, and headed downstream, or seaward, at 1542½ hours. The wind was fresh to strong from the southeast, and squally, with intermittent rain showers, and there was an incoming tide.

Before reaching the bridge with which the collision occurred, in her progress down the river, it was necessary for the vessel to negotiate, in the following order, the Lackawanna Railroad Bridge, and the so-called City bridge, a short distance to the south of the Lackawanna bridge, both of which are drawbridges, and then to pass beneath the fixed Pulaski Skyway bridge. Because of her position at the wharf during the cargo discharge operations, it became necessary for her to be turned around. There was some conflict in the testimony respecting the location at which the vessel, with the assistance of the two tugs, was turned about. The master of the vessel testified that this maneuver was executed to the south of the Lackawanna bridge, after the vessel had been towed stern-first through that draw, whereas evidence for the respondents was to the effect that the turn-around took place to the north of the railroad bridge and that the vessel passed through the draw of that bridge bow first. The vessel's Deck Log book discloses: "1537 V/L swinging in river. 1542½, V/L swung, slow ahead, proceeding downriver. 1543½, Lackawanna bridge opened. 1546 dead slow ahead, V/L cleared Lackawanna Bridge." These entries are confirmed by similar entries in the bridge movement book and in the engine movement book of the vessel. Whatever may have been the manner of her passage of the Lackawanna drawbridge, she accomplished it without incident, and her passage through the City bridge draw was also uneventful. Her navigation, while proceeding downstream, was under the control of Captain John Bassett, a Dock Master and

River Pilot, employed by the owner of the two tug-boats above mentioned, but his testimony could not be presented because of his death before the trial. However, the testimony of Captain Hawkins, the Master for the vessel, who was with the Pilot on the vessel's bridge during the operation, disclosed that, at 1546 hours, while passing through the draw of the City bridge, which crosses the river at a point 1.1 nautical miles to the north of the bridge with which the vessel collided, the Pilot signalled for the opening of the latter bridge by three blasts of the vessel's whistle. The giving of this signal is corroborated by the Chief Bridge Operator in his written report, following the collision. This signal was acknowledged by the Highway bridge by two blasts of its horn (the prescribed warning of delay in opening the draw), but the drawspan of the bridge nevertheless commenced to rise almost immediately.

The bridge operator, respondent Peschken, stated in his post-collision report to the New Jersey State Highway Department: "We knew that the tugs had gone up the river for the steamer and we were watching for them. When we seen (sic) them coming I signalled the gatemen to close the gates and I gave the steamer two long blast (sic) on the horn. Due to electrical trouble on the bridge this was done before the steamer reached the Skyway. The span was in upward motion before the steamer was under the Skyway." He testified on the trial, however, that he gave a second two-blast signal after the respondent Hines told him the vessel was "coming down pretty fast." Respondent Hines testified to a similar effect.

As the vessel was in the vicinity of the Pulaski Skyway bridge, its speed had been reduced to slow ahead. At 1555 hours the bridge draw-span appeared to the master to have

stopped rising and the vessel's engines were immediately brought to dead slow ahead and then to stop. At 1555½ hours they were driven full astern. By that time the position of the vessel with reference to the draw-span was such as to create doubt whether her masts would clear the draw-span of the bridge. The reversal of the engines was insufficient to eliminate all way from the vessel, and the fore topmast hit the bridge draw-span section, which was struck again within a few moments thereafter by the main topmast. After the latter contact the bridge draw-span section rose or continued to rise to its fully elevated position. Upon inspection, the points of contact of the span girder were found to be nine feet ten inches below the truck on the fore topmast and six inches below the truck on the main topmast. Following these conditions, the vessel proceeded to the marine repair yard of Bethlehem Steel Company at Stapleton, Staten Island, New York, where the damage was repaired. The voyage to Curacao was then resumed on December 23, 1957.

Captain Hawkins testified that after the Highway bridge signaled to acknowledge the vessel's signal, no further warning of the stopping or slowing of the rise of the draw-span, or of any difficulty in its operation, was given, and that the orders to stop and reverse the engines were given upon the Pilot's visual observation from the vessel's bridge of the slowing or stopping of the lifting of the draw-span.

Respondents concede that the vessel passed through the Lackawanna bridge draw at 1546. This fact is disclosed by the log book of the tender of that bridge, as well as by the deck log book of the vessel. The bridge tender of the City bridge testified that the vessel passed through his draw

at 1548 hours. She was then somewhat over one-half a nautical mile north of the Pulaski Skyway fixed bridge beneath which she was about to pass, and at that time the Lincoln Highway bridge's draw-section was already in upward motion. Libelant contends that the vessel's fore topmast struck respondents' draw-section at 1557 hours, ship's time. Respondents' draw-bridge log reports the vessel's passage through the Lincoln Highway draw between 3:42 and 3:48 p. m. (1542/1548 hours). This entry is obviously incorrect, especially in view of the entry in the railroad bridge tender's log book that the vessel passed through the Lackawanna draw at 1546. If the vessel passed through that draw at 1546 and through the City bridge draw at 1548 hours, she could not have reached the Lincoln Highway bridge, 1.1 nautical miles away, at the same instant. I find as a fact that the vessel covered the distance to the Lincoln bridge in nine minutes, or at the rate of 743.132 feet a minute, an average of 7.33 knots. The Captain of the Lembulus, however, admitted that her average speed between the Skyway and the Lincoln Highway bridges was 9 knots. Average speed between the designated points is misleading, however. A high speed at the start and slow speed near the finish averages the same as would the reverse of those speed allocations. I am concerned with the speed of the vessel between the moment the bridge span commenced to rise and that of the collision. Her course was generally southwest; the wind was fresh to strong from the southeast, and she was moving against an incoming tide. She had slowed from full ahead to slow ahead at 1553 hours, five minutes after passing through the City bridge draw and four minutes prior to the collision, and her engines were stopped at 1555 hours and at 1555½ hours

were ordered to full astern. They were going full astern at the moment of collision. A master mariner, familiar with vessels of the size of the Lembulus, and with the Hackensack River channel in which she was proceeding, testified, for respondents, that under the circumstances and conditions existing at the time of the occurrence here in question the maximum safe speed for the vessel between Koppers Wharf and the Lincoln Highway bridge would be 3½ to 4 knots. But this opinion of the witness was predicated upon the assumption, contrary to fact, that the tide was ebbing. The opinion of this expert that a speed of nine or ten knots between Kopper's Wharf and the Lincoln Highway bridge would be excessive does not impel me to conclude that the vessel was moving at an excessive speed over the ground between the point at the Skyway bridge where she signaled for the opening of the draw at 1553 hours, with her engines at slow ahead, and that of her contact with the draw section at 1557 hours. Between these two points her engines reached no higher speed than dead slow ahead, and they were going full astern at the moment of collision. I am not convinced that the speed at which she was traveling was immoderate or excessive because of the existing weather and tidal conditions.

As already pointed out, the regulations governing the operation of the Lincoln Highway drawbridge as the Lembulus approached it required the vessel to indicate her intention to pass through the draw by three blasts of her whistle when within signaling distance of the bridge. It is uncontradicted that the Lembulus complied with this requirement. The bridge operator was required, by the same regulations, to answer the vessel's signal with three blasts of the bridge's horn if the draw was ready to be immedi-

ately opened, but if there were delay incident to mechanical failure or otherwise, he was required to so indicate by two long blasts of the bridge horn. *33 C. F. R. § 203.200.* Captain Hawkins testified that as the Lembulus was "about to pass under the Skyway bridge at approximately 1553 hours, three whistle blasts were blown" by the vessel as a signal to the bridge to open. He further testified that "the bridge answered our signal and commenced lifting almost immediately." It will be observed that the Captain did not say of how many blasts the bridge's answering signal consisted. The vessel's speed was then reduced to dead slow ahead to enable her to shape course to pass through the comparatively narrow opening afforded by the draw. That the draw span was rising in what appeared to the vessel to be a normal manner following its receipt of her signal, but that the span then seemed to slow to such an extent that it was difficult to tell whether it was still moving or had stopped, was confirmed by the testimony of the Captain of one of the tug boats, which accompanied the Lembulus as she approached the bridge. He also testified that the Lembulus was moving very slowly as she approached the draw. He, however, was not asked how many blasts were given by the bridge tender in answer to the vessel's signal, nor whether any subsequent warning was sounded from the bridge.

Peschken had been aware for some time previous to the date of the collision that the electrical operating mechanism of the drawbridge was in a defective condition. Respondents' witness, Iannaccone, in charge of maintenance of the electrical bridge draw operating facilities for the State Highway Department, had discovered some time previously a malfunction in the mechanism of the Lincoln Highway bridge, which manifested itself only when the speed

of the bridge opening was above what he called the "third power point". It was known to the electrical supervisor as well as to the drawbridge operator that the draw could only be opened slowly because of the risk of stoppage through power failure. Despite the two-blast response of the bridge to the vessel's three-blast signal to open, the prompt commencement of the draw opening was inconsistent with the implications of the two-blast bridge response, and constituted no notice that the draw would open slowly or stop during its rise. The vessel was entitled to assume that it might proceed with safety from the point at which it was at the time the span commenced to rise.

There is another aspect of the case which discloses failure of the drawbridge operator to exercise the degree of care imposed upon him not only by the governing regulations, but also because of the peculiar circumstances of the situation, including his knowledge of the risk of stoppage of the draw through power failure. The electrical supervisor testified that the draw opening mechanism was provided with dual control systems so that, in the event of failure of one, an alternate might be used in the lifting of the draw-span. The slowing or stopping of the draw, which occurred in this case, and which unquestionably resulted in the damage to the topmasts of the vessel, satisfies me that the power failure actually occurred, and that the alternate control available to overcome such failure was not employed.

A bridge spanning a navigable river which constitutes an obstruction to navigation must be so maintained and operated that navigation may not be impeded more than is absolutely necessary. The right to navigate the river is paramount to the right to maintain a bridge across it, and therefore a bridge must be so constructed and maintained

that it may be readily opened to admit the passage of vessels. "If for any reason the bridge cannot be opened, proper signal is to be given to that effect, such as will warn the approaching vessel in time to heave to. A vessel, having given proper signal to open the bridge and prudently proceeding under slow speed, has, in the absence of proper warning (from the bridge) the right to assume that the bridge will be timely opened for passage. She is not bound to heave to until the bridge has been swung or raised and locked and to critically examine the situation before proceeding, but may carefully proceed at slow speed upon the assumption that the bridge will open in response to the (vessel's) signal, and may so proceed until such time as it appears by proper warning, or in the reasonable view of the situation, that the bridge will not be opened when it becomes the duty of the vessel, if possible, to stop, and if necessary, to go astern." *Clement* v. *Metropolitan Westside Elevated Railway Co.*, 7 Cir. 1903, 123 Fed. 271, 273; *Munroe* v. *City of Chicago*, 7 Cir. 1912, 194 Fed. 936, 940. The duty of the bridge operator to signal if the draw cannot be opened at all is the same as that required if the draw cannot be opened sufficiently to permit the vessel's passage without contact therewith. The same rule was applied under similar circumstances in *The Kard*, 3 Cir. 1930, 38 F. 2d 844, and still more recently by Judge Meaney of this Court, in *Conners Marine Co.* v. *New York and Long Branch Railroad Co.*, 1950, 87 F. Supp. 132. Respondents seek to distinguish *The Kard, supra, Clement* v. *Metropolitan Westside Elevated Railway Co., supra*, and *Munroe* v. *Chicago, supra.* In *The Kard* the bridge tender gave the signal in response to that of the tug boat, raised the draw span to less than the required height and the tow collided with the bridge. In that case, however, as in

the *Clement* case, the failure of the bridge tender to give the vessel warning, coupled with the partial raising of the draw span, was held to have constituted an invitation to the tug to come on through. In the *Munroe* case, 7 Cir. 1912, 184 Fed. 936, cert. den. 229 U. S. 609, the vessel which was ascending the Chicago River at night, signalled for the opening of the draw bridge owned by the City. The bridge was neither opened nor was any warning given that the bridge owner (City) had failed to keep someone in charge to operate the draw upon proper signal from a vessel. The decree for the City was reversed.

A similar situation existed in *The Louise Rugge,* 3 Cir. 1917, 239 Fed. 458, although in that case the bridge was a temporary structure and the vessel had laid-to until the light on the end of the span showed that it had been raised and stopped. There was no warning given by the bridge tender that the vessel should not attempt to navigate the passage.

Portions of the deposition of the respondent Peschken, taken pursuant to Rule 26, were read into the trial record, and disclose that he then testified that when his men notified him that the steamer was coming, it was some distance up-river and had not yet reached the Skyway where she gave her three-blast signal. Peschken was aware of the electrical trouble with the drawbridge mechanism, and therefore commenced to open the draw as soon as he was aware of the vessel's approach. He also testified that the span was in upward motion before the steamer was under the Sky-way bridge, but that he was opening the draw slowly as a precaution against a recurrence of the previous electro-mechanical failure. Peschken also testified upon these depositions that although he was aware that the regulations required, in case of delay in opening the draw span

due to failure of equipment, that the two-blast warning signal be repeated at intervals until the draw could be moved, he did not, at any time, comply with that requirement or with the requirement that three blasts of the siren be given when the span starts to rise. In refraining from giving the required three-blast signal when the draw commenced to open, and in giving instead a two-blast signal Peschken said he was following his usual practice. Despite this testimony on deposition, Peschken testified at the trial that he had repeated the two-blast signal to the vessel before the collision. If such testimony is true, it would indicate that the bridge tender twice warned the vessel to stand-off, although at the same time continuing to open the draw-span.

Respondents argue that because the evidence disclosed that there were frequent heavy rain showers on the day of the collision, the vessel was required to sound a prolonged blast of her whistle at intervals of not more than one minute in compliance with 33 U. S. C. § 191, which provides for such a signal "in fog, mist, falling snow or heavy rain storms." Because of the admitted non-compliance with this requirement on the part of the vessel, respondents seek to apply "The Pennsylvania" rule (*The Pennsylvania*, 86 U. S. 125), which requires that a vessel bear its own loss unless she can show that her fault could not have contributed to the accident. I conclude that the cited statutory section is not applicable in the circumstances disclosed by the evidence in this case. In *The Pennsylvania*, the collision between the two vessels occurred in a very dense fog. There is no evidence in the case before me indicating that it was even raining at the time of the occurrence, or that any rain which had been or may then have been falling had any effect upon visibility. The bridge personnel both heard and saw the vessel approaching. It was the

visual observation by the Pilot of the vessel that the draw-span of the bridge was rising following the vessel's whistle signal that induced him to continue to approach the bridge with the intention of passing through the draw. Respondents' further reliance upon Section 192 of Title 33 of the United States Code is equally misplaced for support of respondents' contention that the provisions of that section were being violated because the vessel was not proceeding at a moderate speed.

Respondents rely upon *Linde-Griffith Construction Co.* v. *The Authentic*, 2 Cir. 1954, 210 F. 2d 757, for support of their contention that in continuing to approach the draw despite her receipt of the two-blast warning signal or signals, the Lembulus acted in direct violation of the provisions of 33 C. F. R. 203.200. In *The Authentic* case the bridge operator was exonerated because of the "glaring" fault of the tug which was towing the pile driver. In that case the tug blew the usual three-blast signal, which was answered by a two-blast signal from the bridge, forbidding the closer approach of tug and tow, because the span was being used by passing rail traffic. After traffic on the bridge had cleared, the draw span was raised to its normal elevation. The bridge tender then gave the tug the correct signal to proceed through the draw, but because of the improper handling of the tug, in shaping herself and her tow for passage of the draw, the pile driver collided with the opened leaf of the draw-span. It was not until the pile driver was actually passing through the draw that the inevitability of its contact with the bridge girder became manifest. It was then too late for the bridge tender to raise the draw-span through its additional three degree range. In the case before me the issue of liability appears to be dependent upon the respective opportunities of the vessel and the bridge to

avoid the collision which occurred. If, as the respondents contend, the bridge tender gave the signal warning to stand off because of the possibility of power failure, and if the vessel had heeded that warning, then when the bridge tender had succeeded in fully opening the draw he might be expected to give the prescribed "come-on" signal of three blasts, which would have permitted the vessel to pass through unharmed. On the other hand, the bridge commenced to open immediately following the vessel's signal, and continued to open, despite the two-blast signal or signals which the respondents claim were given. When the vessel was but a ship's length from the draw the span was observed to slow or stop, and although her engines were then driven full astern, it was too late for the vessel to avoid the contact with the bridge girder. See *Clement* v. *Metropolitan Westside Elevated Railway Co.*, 7 Cir. 1903, 123 Fed. 271, 273; *The Kard*, 3 Cir. 1930, 38 F. 2d 844. In *Connors Marine Co.* v. *New York and Long Branch R. Co.*, D. C. N. J. 1949, 87 F. Supp. 132, no answer was given by the bridge tender to either of two signals from the vessel, whereupon her engines were slowed and then stopped, but due to wind and tide, she drifted out of shape for passage through the draw. The draw span was ultimately opened, but in attempting to pass through the draw, the barge which was being towed by the vessel collided with the bridge abutment and was damaged. The Court there concluded that both bridge and tug were at fault, entitling the tug owner to contribution from the bridge owner. The failure of the bridge tender to give an answering signal invoked the Court's application of *The Pennsylvania* rule, *supra*, (86 U. S. 125).

In our case, the bridge draw was actually being operated by the respondent Peschken. While he did not personally

see the approach of the Lembulus as she proceeded downstream, it was reported to him by the respondent Hines, who, together with the respondent Bents, heard the vessel's three-blast signal of her intention to pass through the draw. This signal was also heard by Peschken when the vessel was over a nautical mile distant from the bridge. Peschken apparently started to open the draw promptly after receiving notification of the vessel's approach. However, when the draw section stopped in its ascent, or slowed to a point at which it appeared to have stopped, the bow of the vessel was then approximately her length away from the bridge abutment, and shaped for passing through the draw, at which time it first became apparent to her Captain that the topmasts would not clear. Whether, therefore, the bridge draw-span had actually stopped, or whether it had but slowed to an almost imperceptible speed, it was then too late for the vessel to avoid the collision, despite stopping her engines and then reversing their revolutions.

Respondents argue that the vessel contributed in the causation of her own damage by reason of the speed at which she approached the draw, in view of the conditions of weather, wind and tide prevailing at the time, and of the lightness of her lading. I have herein discussed at length the progress of the vessel from the Kopper's Wharf to the point of the collision. This consumed some ten minutes of time. The bridge tender testified to his awareness that the vessel was expected to come downstream by reason of the passage upstream earlier of the tugs to assist her. The bridge crew testified that they saw and heard the vessel approaching before she passed the Skyway bridge. If they were unable to accomplish the opening of the draw within that period of time, they were under the obligation of giving warning to the vessel in accordance with the

governing regulations. Mr. Iannaccone testified that operation on the "third power point" required four minutes to fully open the draw, and that ten minutes would be ample time for lifting the span to its maximum height using either the normal or the emergency controls for the purpose. It is uncontradicted that the vessel passed under the City bridge at 1546 hours and that her foretopmasts struck the Lincoln Highway drawbridge span at 1557 hours. It is also uncontradicted that the distance between these two bridges is 1.1 nautical miles. Based on the vessel's bridge log, the master testified that after passing under the City bridge at 1546 hours the vessel's speed was dead slow ahead, and that at 1547½ hours she was given full ahead, harbor speed, or 9 knots. The witness further testified that it would take about ten minutes to build up to the nine knots speed from a half ahead under the conditions existing at the time. At 1553½ hours, six minutes after her engines had been placed on harbor full ahead, their speed was reduced to slow ahead and dead slow ahead by immediately succeeding signals. The evidence is barren of any justification for assumption that the vessel had any reason to assume that the speed at which she was approaching the draw could involve any risk of the developments which occurred. I find that by commencing the raising of the draw-span immediately following his "warning" signal, the physical raising of the bridge countered the effect of such warning, and served as an invitation to the vessel to proceed. See *Clement* and *The Kard, supra.* I can, therefore, find no basis for concluding that the vessel contributed in bringing about the collision, and am unable to relieve the draw bridge operator of responsibility for the occurrence.

There remains the question of the liability of the respondents Hines and Bents to the libelant. While it is true

that these two respondents were, with Peschken, employees, and therefore agents or servants of the bridge owner, I can find in the evidence no basis for concluding that any act or omission on the part of, or chargeable to Hines or Bents contributed in the causation of the collision. Each of the three respondents had certain functions to perform in the opening of the span, and the responsibility for the giving of signals to approaching vessels and for operating the lift mechanism of the draw span appears to have rested exclusively upon Peschken. Therefore, there is but one claim in this case, namely, that of the vessel against Peschken. No liability has been proven against Hines or Bents.

The negligence which I find solely responsible for the collision was that of Charles Peschken alone. A decree may be entered in favor of the libelant and against the respondent Charles Peschken only, for such damages as libelant may prove, in accordance with the applicable Admiralty practice of this Court, and for its costs herein. Judgment may be entered for the respondents Canolius V. Hines and Fred W. Bents against the libelant for their costs.

This opinion shall constitute my findings of fact and conclusions of law. Let judgments be entered accordingly.

REYNIER J. WORTENDYKE, JR.
Judge, United States District Court.

APPENDIX B

Opinion of the District Court Denying Motion for Judgment in Favor of Respondent Charles Peschken Notwithstanding the Court's Opinion Filed on June 24, 1960

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK 1, N. J.

October 26, 1960

REYNIER J. WORTENDYKE, JR.
Judge

Re: C-793-59—The Shell Petrolum Co. Ltd., etc.
vs. Charles Peschken, et als

McCarter and English, Esqs.,
11 Commerce Street,
Newark 2, New Jersey

Attn.: Francis E. F. McCarter, Esq.
With extra copy for
Robert M. Julian, Esq.

David D. Furman, Esq.,
Attorney General of New Jersey,
State House,
Trenton, New Jersey

Attn.: Alfred P. D'Auria, Esq.
Deputy Attorney General

Gentlemen:

My findings of fact and conclusions of law in this case were embodied in my opinion filed June 24, 1960 which has been reported in 184 F. Supp. 950. Thereafter libellant noticed a motion to settle the form of the interlocutory decree, but before the return of that notice, respondent Charles Peschken noticed a motion for judgment in his

favor notwithstanding my findings and conclusions. The latter motion was orally argued and the arguments supplemented in writing.

I have reviewed my filed opinion in this case, my trial notes, the transcript of the testimony and the pretrial depositions, and have considered the authorities and arguments cited and advanced by counsel. I am not convinced that my previous findings and conclusions should be modified.

Respondent's motion is grounded upon his contentions that (1) the evidence failed to justify a finding of negligence on the part of the bridge-tender, and (2) fault on the part of the vessel, causally related to the collision, is clearly disclosed by the proofs. I cannot agree with either of these contentions.

The continued use of the defective draw span elevating mechanism by the New Jersey State Highway Department was negligent on its part, and the knowledge of the persistence of that defect had been brought home to the bridge operator and the likelihood of a slow-up or stoppage in the opening of the draw was apparent to him. There is no evidence that the master of the vessel or her pilot had knowledge either of the defect or of the regulations adopted by the Highway Department with regard to the giving of warning signals, and therefore the vessel was entitled to rely upon the regulations promulgated by the Secretary of the Army, from which I have quoted in my filed opinion. Assuming as true the bridge operator's testimony that he gave a two-blast signal in response to the three blasts from the vessel, the commencement of the opening of the draw almost immediately thereafter and its obvious continuance,

without further warning signal until the vessel was so close as to be unable to stop her forward movement, constitutes, in my opinion, negligence on the part of the bridge operator which was solely responsible for the collision complained of. In sum, the commencement of the opening of the draw so promptly after the two-blast signal under the weather conditions which existed at the time, coupled with the continued rise of the draw span without further warning signals until collision was inevitable, constituted a reliable invitation on the part of the bridge operator to those in charge of the vessel's nagivation to proceed and to expect that when the vessel entered the draw the span would have reached an elevation permitting her masts to pass beneath it without contact. I do not find that the vessel's speed played any part in bringing about the collision.

Accordingly, the motion of Charles Peschken for judgment notwithstanding the Court's filed opinion in this case must be denied.

Very truly yours,

REYNIER J. WORTENDYKE, JR.
Reynier J. Wortendyke, Jr.
Judge, United States District Court

RJW.Jr/e
Original to Clerk for official file.

APPENDIX C

Opinion of the Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,481

THE SHELL PETROLEUM COMPANY, LIMITED, a corporation in its own behalf as Owner of the Motorship Lembulus

v.

CHARLES PESCHKEN,

Appellant

and

CANOLIUS V. HINES and
FRED W. BENTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Argued May 2, 1961
Before GOODRICH and STALEY, *Circuit Judges;* and FORMAN, *Senior Circuit Judge.*

OPINION OF THE COURT

(Filed May 23, 1961)

By GOODRICH, *Circuit Judge.*

This is an appeal from an interlocutory decree for the libellant in an admiralty case. The ship Lembulus, owned by The Shell Petroleum Co., Ltd., collided with a draw-

bridge known as the Lincoln Highway Bridge on December 20, 1957. At the time of the collision the bridge was in the process of opening. The respondent Peschken was the chief drawbridge operator of the bridge. Two other persons who were part of the bridge crew were sued in the court below but the action against them was decided in their favor and there has been no appeal. The district court opinion may be found in 184 F. Supp. 950 (D. N. J. 1960). This opinion was somewhat modified later by a letter which is not reported. The question to be decided in this case is a much simpler one than the oral argument by the parties and their briefs would indicate.

The Lembulus discharged its cargo at Kearney Point, New Jersey, some distance north of the Lincoln Highway Bridge, the locus of the collision. She was taken out into the channel of the Hackensack River with the help of tugs and started downstream. As the vessel was in the vicinity of the Pulaski Skyway approaching the Lincoln Highway Bridge, she gave three blasts of her whistle to indicate to the bridge operators that she desired to pass through. This signal was answered by two blasts from the bridge It may be that this two-blast signal was repeated by the bridge but the court made no finding to this effect and whether a second two-blast signal was given is not material to our determination of this case. At the time the bridge answered the ship with the two-blast signal those in charge immediately began the process of opening the draw. No one from the bridge gave a three-blast signal which would have indicated to the ship that she could come ahead. The ship proceeded in the direction of the bridge. The bridge mechanism either stopped momentarily or slowed down so that the draw was not fully open at the

time when the Lembulus reached the bridge. She hit the partially opened draw with both her fore topmast and main topmast. This is the damage complained of.

The legal problem presented by the above facts seems to us one which can be settled quickly. The Secretary of the Army, by statute, (33 U. S. C. A. § 499) has authority to make rules and regulations to govern the opening of drawbridges for the passage of vessels on navigable waters. Such regulations have the force of law. *Cf. Belden* v. *Chase,* 150 U. S. 674 (1893). The portion of the regulation applicable to the case before us is found in 33 C. F. R. 203.200 (1949). Here is the relevant language:

> "(d) When a vessel appoaches within signaling distance of a bridge for passage, the master thereof shall signify his intention by three blasts of a whistle or horn . . . . The signal of the craft shall be immediately answered by the tender or operator of the bridge. If the draw is ready to be immediately opened, the answer shall be three blasts of a whistle or horn from the bridge. In case of delay in opening the draw, as is provided for in this section, or as may be necessary by accident to the machinery or other contingency, the signal from the vessel shall be answered by two long blasts of a whistle or horn from the bridge. In all cases when delay signals have been given, a signal of three blasts of a whistle or horn shall be given as soon as it is possible to open the draw."

The Lembulus disobeyed the rule as is readily apparent from the statement of facts given above and reading the command set out in the rule. She signaled properly in approaching the bridge. But the bridge responded with the caution signal and under the rules that is the effective

signal until removed by a three-blast signal from the bridge. It appears from the evidence that there had been some difficulty with the mechanism of the draw raising apparatus. The two-blast signal was quite proper under those circumstances and had it been obeyed the collision would not have occurred. The error on the part of the learned trial judge was in his statement that the immediate response to the Lembulus's signal was the beginning of the operation to raise the bridge. The judge thought that this was an invitation to continue forward on the part of the bridge operator and, we suppose, withdrawal of the warning given by the two-blast signal. The court relies on several cases where it has been said that in the absence of warning to the contrary a ship approaching a bridge may assume the bridge will be open when it arrives.[1] Those cases are completely reconcilable with our conclusion here. Peschken, operating the Lincoln Highway Bridge, did give the warning signal. Perhaps he gave it twice. And no three-blast "come ahead" was given. The ship is clearly at fault. If her failure to obey the signal contributed to the collision, she cannot recover under the rule of *The Pennsylvania,* 86 U. S. 125 (1873). But we do not need the authority of *The Pennsylvania* to decide this case against the libellant. The disobedience of the rule was the substantial cause of the collision.

Language from *Belden* v. *Chase,* cited above, is apposite to the situation here. Speaking of the rules the Court said, "They are not merely prudential regulations,

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[1]The Louise Rugge, 239 Fed. 458 (3d Cir. 1917); Munroe v. Chicago, 194 Fed. 936 (7th Cir. 1912), *cert. denied,* 229 U. S. 609 (1913); Clement v. Metropolitan West Side El. Ry. Co., 123 Fed. 271 (7th Cir. 1903); Conners Marine Co. v. N. Y. & Long Branch R. R. Co., 87 F. Supp. 132 (D. N. J. 1950); The Kard, 38 F. 2d 844 (E. D. Pa. 1930).

but binding enactments, obligatory from the time necessity for precaution begins, and continuing so long as the means and opportunity to avoid the danger remain . . . . Obviously they must be rigorously enforced in order to attain the object for which they were framed . . ." *Id.* at 698.

Our view of the case makes it unnecessary to decide at what point the vessel turned so as to proceed bow foremost downstream. It is also unnecessary for us to consider the disputed question of the speed of the Lembulus as she approached the bridge. Whether she was going fast or slow does not matter because she disobeyed the rule, whatever was her speed.

The judgment of the district court will be reversed and the case remanded with directions to enter judgment in favor of the respondent.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX D

Judgment of the Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THE SHELL PETROLEUM COMPANY, LIMITED, a corporation in its own behalf as Owner of the Motorship LEMBULUS
vs.
CHARLES PESCHKEN, *Appellant,*
and
CANOLIUS V. HINES and FRED W. BENTS

No. 13,481

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: GOODRICH and STALEY, Circuit Judges; and FORMAN, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the case remanded with directions to enter judgment in favor of the respondent.

Attest:
IDA O. CRESKOFF
Clerk

May 23, 1961

APPENDIX E

Departmental Rules on Openings

(All Bridges)

THESE RULES ARE IN CONFORMITY WITH THE REGULATIONS PRESCRIBED BY THE DEPARTMENT OF THE ARMY, FOR THE OPERATION OF DRAW BRIDGES IN THIS SECTION.

Signals

All call signals for openings shall be answered promptiy by the bridge by 2 long distinct blasts.

This signal indicates to the boat that the call signal has been heard and preparations to open will be made.

After this signal the Bridge Operator shall open his bridge at such a time which in his judgment and experience will permit prompt passage of the boat without unreasonable delay and will not create any unreasonable delay to land traffic.

At no time shall the draw be moved until all sidewalk and roadway traffic gates are locked in their closed position.

If the draw cannot be opened the 2 blast signal shall be repeated until acknowledged by the boat.

It is extremely important that the draw be brought to its fully opened position at all times, irrespective of the size of the boat. (This does not apply to test openings).

When the draw is fully opened the Bridge Operator shall sound the same signal as the call signal.

While the draw is in its fully open position no attempt shall be made toward closing until the passing boat has cleared the draw.

Departmental Rules on Openings
(All Bridges)

Except in rare emergencies the draw shall not be moved either in closing or opening while there is a boat in the draw. When the draw is fully closed and land traffic can be resumed the Bridge Operator is to sound *one* blast which will be the signal for the Bridge Tenders to open all traffic gates. Visual signals shall be used as prescribed by the Department of the Army whenever sound signals cannot be given or if sound signals cannot be heard.

The time of an opening shall be the interval between the time the traffic gates are closed and the time they are opened. In addition to the United States Government hours of opening, all movable bridges over the Harlem River will be open on call signal by any boat between the hours of 7 P.M. and 6 A.M. of the next day.

Thus the *closing hours* of these bridges over the Harlem River (except for U. S. Government or Municipal Boats) will be from *6 A.M. to 10 A.M.* and again from *5 P.M. to 7 P.M.*

APPENDIX F

Exhibit P-13c introduced into evidence, record page 177. Photograph of New Jersey State Highway Department Rules posted on Hackensack River Bridge.

NEW JERSEY STATE HIGHWAY DEPARTMENT

RULES

GOVERNING PROCEDURE IN OPENING AND CLOSING DRAWBRIDGES

1. Gates are to be closed and draw opened when, in the operator's judgment, the boat has approached within a proper distance.

2. If opening is delayed abnormally due to traffic conditions or to failure of equipment, the signal of two blasts is to be repeated at intervals until the draw can be moved.

3. On vertical lift bridges, three blasts of the siren are to be given (four blasts for government craft) when the span starts to raise, and the operator shall continue to raise the span until the boat enters the draw, or the nearly-open limit is reached. If it appears that the nearly-open limit will be required, then the by-pass shall be used and the span raised to the fully-open limit. Span shall not be moved in a downward direction until the entire craft or assembly or crafts has passed through the draw. One gateman, designated by the operator, shall be responsible for certifying when the channel is cleared; and for advising the operator of the approach of other boats which may require the draw to remain open. In the latter case, the operator shall decide whether to wait or close. Two blasts of the siren are to be blown when the span has started to close.

4. No other signals than those indicated in the foregoing rules are to be used in connection with the opening and closing of drawbridges.

5. Duration of opening shall be the time elapsed from the closing to the opening of traffic gates, to the nearest minute.

ALL MEN OPERATING DRAWBRIDGES ARE REQUIRED TO COMMIT THESE RULES TO MEMORY. ALL PRACTICES CONTRARY TO THESE RULES SHALL BE DISCONTINUED IMMEDIATELY.

VIOLATION OF ANY OF THEM SHALL BE CAUSE FOR DISCIPLINARY ACTION.

APPENDIX G

Statutes and Regulations Involved

33 C. F. R. 200; 33 U. S. C. 494; 33 U. S. C. 499; 33 U. S. C. 512

33 C R. F. 200

§ 203.200 *Newark Bay, Passaic and Hackensack Rivers, and their navigable tributaries; General Regulations.* (a) The draws shall be opened promptly, upon signal, for the passage of vessels during the day or night, except as prescribed in paragraphs (b), (c), or (f) of this section.

(b) During the hours between 7:30 and 10:00 a.m. and between 5:00 and 7:30 p.m. drawbridges shall not be required to remain open longer than 10 minutes nor shall the passage of any vessel be delayed for longer than 10 minutes except as provided in paragraph (f) of this section.

(c) The draw of any bridge used solely for the United States mail, passenger, and express trains need not be opened for a vessel reaching said draw less than 5 minutes before the scheduled arrival of any such train until such train passes, unless the bridge tender has notice that the train is delayed more than 5 minutes. The owners of bridges acting under this rule shall maintain a tug at the drawbridge to control and aid in the passage of vessels.

(d) When a vessel approaches within signaling distance of a bridge for passage, the master thereof shall signify his intention by three blasts of a whistle or horn. For those bascule bridges that have two separate and distinct drawspans the approaching vessel shall signal for an opening of the bridge in the customary manner by three blasts of a whistle or horn, and this shall be followed after a short interval with one blast, if it is desired that the drawspan on the starboard hand as the vessel approaches be opened, or by two blasts if it is desired that the one on the port hand be opened. The signal of the craft shall be immediately an-

swered by the tender or operator of the bridge. If the draw is ready to be immediately opened, the answer shall be three blasts of a whistle or horn from the bridge. In case of delay in opening the draw, as is provided for in this section, or as may be necessary by accident to the machinery or other contingency, the signal from the vessel shall be answered by two long blasts of a whistle or horn from the bridge. In all cases when delay signals have been given, a signal of three blasts of a whistle or horn shall be given as soon as it is possible to open the draw.

(e) Upon hearing or perceiving the signals prescribed, the tenders or operators of a drawbridge, except as provided in paragraphs (b), (c) and (f) of this section, shall at once open the draw signaled for so as to allow the prompt passage of any vessel or craft: *Provided,* That the bridge may not be opened when there is a train, wagon, or vehicle at the time passing over said drawspan, or a train approaching so closely that it cannot be safely stopped before reaching the bridge, but it shall be opened as soon as the drawspan can be cleared. In case the opening of the draw will be delayed under the provisions of paragraph (c) of this section the tug stationed at the draw shall immediately go to the assistance of the vessel.

(f) Each tug, towboat, barge and other small craft regularly and habitually navigating the aforementioned waterways shall be subject to inspection and measurement by the district engineer, Engineer Department at Large in charge of the locality, to determine which vessels, if any, would, by reasonable reductions in heights of masts and/or stacks, be capable of passing under the closed draw of any bridge affording at least vertical clearance of 35 feet at mean high water. The said district engineer will notify the owners

of such vessels as can be so modified, of the date by which the modifications shall be completed. In the event of the failure of said owners to comply with such notification, the district engineer will authorize the above bridge owners to delay opening their bridges, for the passage of said vessels, until convenient to do so, but on no occasion for more than 45 minutes: *Provided, however,* That such vessel shall not be so delayed when it has in tow another vessel or craft of such height as to require the opening of the bridge, or when, because of the stress of weather, prompt opening is necessary.

(g) Trains, vehicles, vessels or other watercraft shall not be stopped or manipulated in a manner hindering or delaying the operation of the draw, but all passage over the drawspan or through the draw opening shall be in a manner to expedite both land and water traffic.

(h) The regulations in paragraphs (a) to (g) of this section apply only to commercial or pleasure vessels. Steamers or vessels employed or controlled by the United States Government, State government, or by municipal departments shall be passed without delay through the draws of said bridges at any hour of the day or night, upon giving four blasts of the whistle.

(i) Clearance gages of a type to be approved by the district engineer, Engineering Department at Large, in charge of the locality, shall be provided by the owner of each bridge and be kept in good legible condition. Unless otherwise specified, such clearance gages shall consist of two board gages painted white with black figures not less than 9 inches high, which shall indicate the headroom clearances under the closed span at all stages of the tide. These gages shall be illuminated at night and during the time of

fog, rain and snow. These gages shall be so placed that they will be plainly visible to the navigator of a vessel approaching the bridge either up or downstream.

33 U. S. C. 494

[Regs., July 8, 1933, Mar. 31, 1934, as amended Sept. 27, 1934, and at 12 F. R. 4963, 13 F. R. 8740]

§ 494. Obstruction of navigation; alterations and removals; lights and signals; draws; tolls.

No bridge erected or maintained under the provisions of sections 491-498 of this title, shall at any time unreasonably obstruct the free navigation of the waters over which it is constructed, and if any bridge erected in accordance with the provisions of said sections, shall, in the opinion of the Secretary of the Army, at any time unreasonably obstruct such navigation, either on account of insufficient height, width of span, or otherwise, or if there be difficulty in passing the draw opening or the drawspan of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the Secretary of the Army, after giving the parties interested reasonable opportunity to be heard, to notify the persons owning or controlling such bridge to so alter the same as to render navigation through or under it reasonably free, easy, and unobstructed, stating in such notice the changes required to be made, and prescribing in each case a reasonable time in which to make such changes, and if at the end of the time so specified the changes so required have not been made, the persons owning or controlling such bridge shall be deemed guilty of a violation of said sections; and all such alterations shall be made and all such obstructions shall be removed at the expense of the persons owning or operating said bridge. The persons owning or operating any such bridge shall maintain, at their

own expense, such lights and other signals thereon as the Commandant of the Coast Guard shall prescribe. If the bridge shall be constructed with a draw, then the draw shall be opened promptly by the persons owning or operating such bridge upon reasonable signal for the passage of boats and other water craft. If tolls shall be charged for the transit over any bridge constructed under the provisions of said sections, of engines, cars, street cars, wagons, carriages, vehicles, animals, foot passengers, or other passengers, such tolls shall be reasonable and just, and the Secretary of the Army may, at any time, and from time to time, prescribe the reasonable rates of toll for such transit over such bridge, and the rates so prescribed shall be the legal rates and shall be the rates demanded and received for such transit. (Mar. 23, 1906, ch. 1130, § 4, 34 Stat. 85; Mar. 4, 1913, ch. 141, § 1, 37 Stat. 736; 1946 Reorg. Plan No. 3, §§ 101-104, eff. July 16, 1946, 11 F. R. 7875, 60 Stat. 1097.)

33 U. S. C. 499

§ 499. Regulations for drawbridges; penalties for violation; enforcement.

It shall be the duty of all persons owning, operating, and tending the drawbridges built prior to August 18, 1894, or which may thereafter be built across the navigable rivers and other waters of the United States, to open, or cause to be opened, the draws of such bridges under such rules and regulations as in the opinion of the Secretary of the Army the public interests require to govern the opening of drawbridges for the passage of vessels and other water crafts, and such rules and regulations, when so made and published, shall have the force of law. Every such person who shall willfully fail or refuse to open, or cause to be

opened, the draw of any such bridge for the passage of a boat or boats, or who shall unreasonably delay the opening of said draw after reasonable signal shall have been given, as provided in such regulations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than $2,000 nor less than $1,000, or by imprisonment (in the case of a natural person) for not exceeding one year, or by both such fine and imprisonment, in the discretion of the court: *Provided,* That the proper action to enforce the provisions of this section may be commenced before any commissioner, judge, or court of the United States, and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States: *Provided further,* That whenever, in the opinion of the Secretary of the Army, the public interests require it, he may make rules and regulations to govern the opening of drawbridges for the passage of vessels and other water crafts, and such rules and regulations, when so made and published, shall have the force of law, and any violation thereof shall be punished as hereinbefore provided: *Provided further,* That any regulations made in pursuance of this section may be enforced as provided in section 413 of this title, the provisions whereof are made applicable to the said regulations. (Aug. 18, 1894, ch. 299, § 5, 28 Stat. 362; June 13, 1902, ch. 1079, § 6, 32 Stat. 374.)

33 U. S. C. 512

§ 512. Obstruction of navigation.

No bridge shall at any time unreasonably obstruct the free navigation of any navigable waters of the United States. (June 21, 1940, ch. 409, § 2, 54 Stat. 498.)

APPENDIX H

Testimony

WILLIAM AIRD HAWKINS, called by the libellant, having been first duly sworn, testified as follows:

Direct examination by Mr. McCarter:

Q. Where do you live, Captain Hawkins? A. 6 Victoria Terrace Glasgow, Scotland.

Q. How are you employed? A. I am employed by Shell Tankers Limited, London, as Master.

Q. When did you first get your license as a Master? A. 1943.

Q. When did you first get your first berth as a Master? A. 1949.

Q. Between 1949 and the present, have you been serving continuously as a Master? A. Yes.

(3)* Q. Has all of that period been on the high seas or have you had any ashore? A. Two years in shore capacity in Venezuela.

Q. And do I understand that the balance of that time was on the high seas? A. Yes.

Q. How long were you in the merchant marine prior to getting your Master's license? A. Sixteen years.

Q. On December 20th, 1957, would you state what your assignment was? A. I was Master of the motor tanker, Lembulus.

Q. Who was the owner of the Lembulus? On that day. A. This Shell Petroleum Company, Limited, London.

Q. Will you tell us very briefly what was the approximate size of the Lembulus. A. The Lembulus was approximately 445 feet long and 55 feet wide.

*All figures in parentheses indicate the number of each new page of the stenographic transcript.

Q. And approximately what was its tonnage? A. Approximately 6,600 gross tonnage.

Q. How long had you been assigned as Master? Of the Lembulus. Since what date in other words. A. November, 1957.

* * *

(7) Q. Now, before disposing of this particular exhibit, can you identify on this chart the location of the Lincoln Highway bridge spanning the Hackensack River? A. This is the Lincoln Highway bridge here (pointing).

Mr. Carter: Let the record reveal that he is pointing to a bridge marked with a circle in ink. I might add, for the record, that these marks were placed on it at a prior deposition.

The Court: You have no objection to that marking? Have you, Mr. D'Auria?

Mr. D'Auria: No, sir. None at all.

Mr. McCarter: Now, for schematic purposes only, and I specifically state that this is not intended as a scale diagram. To the extent that we require a scale, we can refer to the chart. I now have a photostatic blowup of the area of the Hackensack River between the Copper's Wharf point already identified and slightly beyond the Lincoln Highway bridge, and I would ask that purely for the purposes of demonstration, and not as a scale designation in any way, that we admit this into evidence since it will be far easier to show the movements of the ship on something of this size than on a very small map.

The Court: Mr. D'Auria?

(8) Mr. D'Auria: No objection, Judge.

The Court: Very well. Let it be marked P-2.

(Photostatic blowup marked Exhibit P-2 in evidence.)

Q. By reference to Exhibit P-2, Captain, using a blue pencil, will you please designate on the chart the position of the Lembulus at about three p.m. on December 20th, 1957, as she was moored as you have testified to Copper's Wharf.

The Court: I assume we recognize, of course, that the location of the vessel will not be to scale.

Mr. McCarter: Not at all. There is no attempt at scale in the use of the diagram.

(Witness marks.)

* * *

(27) Q. Now, Captain, what were the conditions of wind and tide at this time? A. There was a squally southeasterly wind and occasional rain showers. The vessel was stemming the tide.

Q. By which I take it in landlubber language you mean the tide was coming in. A. Yes.

* * *

Q. Did you make any signals to that bridge, warning them of your approach? A. Yes.

(28) Q. At about what time did you make that signal, do you recall? A. At about 1553, approximately.

Q. Where were you in relation to the Pulaski Skyway when that signal was made? Were you north of it or south of it, or where? A. Just about to pass under it, slightly.

Q. What signal did you make to the bridge? A. Three blasts.

Q. Can you state what the bridge did thereafter? A. The bridge answered our signal and commenced lifting almost immediately.

Q. And between the time that it started lifting and the time that you have testified that you changed your speed from harbor full ahead to a slower speed, what did you observe with reference to the bridge? A. That it was continuing to lift.

Q. Now, will you state what the purpose of reducing the speed was?

Mr. D'Auria: Your Honor, there again, what was the purpose of reducing speed? Was the speed reduced?

Mr. McCarter: He has testified it was.

The Court: He reduced to dead slow ahead.

Mr. D'Auria: What is the purpose? I think the (29) question should not be asked that way. It is leading.

The Court: I think the objection may be well-taken, for this reason: that the witness was not at the helm and the officer who was in charge—who gave the order—but the witness didn't give the order, but the officer who gave the order would be the only one competent to give the reasons.

Mr. McCarter: I will clear that up. I think the objection is well-taken because I have not laid the foundation.

Q. Captain, during the time, all this time that you have testified to, during the time that the vessel was passing down the river, where were you located on the vessel? A. On the bridge.

Q. And you testified that a pilot was aboard. Will you tell us whether or not that pilot was in charge of the vessel

at that time, or whether you were in charge of it? A. I was in command.

Q. If the pilot had given an order with which you disagreed, did you have authority to countermand that order? A. Yes.

Q. At the time the orders were given to the helmsman, who, in fact, gave those orders during this period? A. The pilot.

Q. And were you present when he gave all those orders? (30) A. Yes.

Q. Well, now, I re-offer the last question. I believe I have laid a foundation to show that, in fact, the orders were made in the presence of the Captain, with his approval.

The Court: Do you object to that?

Mr. D'Auria: I still object to it.

The Court: The question is, why was the speed reduced, wasn't it?

Mr. D'Auria: Yes.

The Court: That is the one you objected to because it calls for a memory operation on the art of the pilot who gave the order, is that right?

Mr. McCarter: I respectfully suggest it does not. It is a question of competency of this witness, by reason of his experience and responsibility at the time, being the Master of the vessel, in charge of conning it down that channel, and what is the purpose from the point of view of conning a vessel down a tight channel of doing what he did at the time it was done. I believe we have laid a foundation by showing every single order that was ever given to the helmsman, given with the actual approval of this Captain, and, therefore, with the knowledge and the consent of the Captain, as to the purpose, and what it was intended to accomplish.

(31) The Court: The difficulty is that the actual giving of the order was by a person other than the witness and, although the witness approved thereof, he obviously would not know what was in the mind of the pilot who gave the order. You may bring out what you are seeking to bring out in a different way, but it seems to me that the objection to the form of the question must be sustained and that will be the ruling.

Mr. McCarter: All right, sir.

Q. At the time you testified you reduced the speed from harbor full ahead, will you testify what was the next required maneuver as you then saw it with reference to the passage of that vessel down the river. A.——

Mr. D'Auria: I then object to that because he says "as you saw it," and the testimony is that the pilot gave all these orders, although the Captain was the Master of the vessel here. The pilot was doing the work and doing a job, and all this Captain did was stand on the bridge with the pilot.

The Court: I will overrule the objection to that question. You may answer.

Mr. D'Auria: You see the further part of the background may be—having taken these depositions—that there must be something further that is brought out with (32) reference to this Captain on this bridge—and as the testimony will further bear out, that this was his first time in this channel, that the pilot, as he testified before in the deposition, gave all the orders.

Mr. McCarter: I object to those comments.

The Court: Just a minute. I will adhere to my ruling. You may attack the credibility and competency of the present witness on your cross examination, but for

the purpose of direct and upon the objection made, I will adhere to my ruling. Go ahead. Next question.

(Record read back.)

The Court: Did you approve of the order of the pilot to the engine room to reduce to dead slow ahead at 1553-½, as you approached the Lincoln Highway bridge?

The Witness: Yes.

The Court: What circumstances within your view induced you to approve that order?

The Witness: The vessel had to pass under the Lincoln Tunnel Highway bridge which is a lift bridge with comparatively narrow piers to pass through, and the ship had to arrive in a position and at a speed whereby she could be safely navigated between the piers on the bridge.

(33) And how far to the north of the draw of the Lincoln Highway bridge was the vessel when she shaped her course for the draw? A. She would approximately be in this position where she could have a straight run through the piers.

Q. That would be approximately how far to the north of the bridge? Could you tell us from your observation at the time? A. Approximately four ship-lengths away.

The Court: All right. That would be 1600 feet, wouldn't it, sixteen or seventeen hundred feet?

The Witness: Eighteen hundred feet.

The Court: Yes, and how far to the north of the draw was her bow when she was—when her speed had been reduced under the order to dead slow ahead?

The Witness: She was in the vicinity of the Pulaski Skyway.

Q. The Pulaski Skyway? A. Yes.

Q. How far to the north of the draw was the bow of the vessel when she blew for the draw, when she signalled for the draw? A. Just north of the Pulaski Skyway.

The Court: All right. Go ahead.

(34) Q. Well, now for schematic purposes only, Captain, will you put on the chart the very approximate location of the vessel at the time the speed was reduced from harbor full ahead that you have already testified? A. 1553-½ slow ahead and dead slow. The vessel would be approximately at this position here, just north of the Pulaski Skyway.

Q. Label that, if you will, please.

I take it that is the time you have already testified to, approximately the time that the signal was made to the bridge? A. Yes.

Q. Well, now, would you give the speed orders made to the engine room between the time the speed was reduced from harbor full ahead to the time that she finally arrived at the Lincoln Highway bridge. A. At 1554, the engine was stopped. At 1555, dead slow ahead and stop; 1556, full astern, and at 1557, the top mast, the forward top mast hit the Lincoln Highway bridge.

* * *

(41) The Witness: At the time when the ship was approximately one ship's length north of the bridge?

The Court: Yes.

The Witness: I observed that the bridge had stopped lifting.

Q. Prior to that time, Captain, had the bridge been moving upward continuously between the time it first started to move and until you saw it stop, as you testified? A. Yes.

Q. Captain, were you in command of this vessel when (42) it moved up the Hackensack River to the Copper Wharf? A. Yes.

Q. And of course you had to pass under this same bridge then, obviously? A. Yes.

Q. Have you, in your experience in these many, many years in the merchant marine, had occasion to be under fixed or draw bridges very much? A. Yes.

Q. How would you describe the quantum of that experience? How much experience have you had? A. I suppose you could say I have passed under lift bridges and fixed bridges several dozen times.

Q. Will you state to the Court what in your experience is the ability of a person standing on the bridge of a vessel to judge whether or not you were going to clear a bridge as you approach it? A. It is almost impossible until you are in a position where you can't do very much about it. It is almost impossible to tell whether you will clear a bridge when you are passing under it until you are in an impossible position to do anything about it.

Q. Let me also ask you this: you have testified already that when you saw that the ship was not going to clear the (43) Lincoln Highway bridge, you sent the first mate out to do some warning, and you have also testified that a movement order was made from the bridge to the engine room of full speed astern. Will you tell us what the effect on the maneuver of this particular is or was at that date of an order of full speed astern? A. A movement of full astern would cant the ship's head to starboard and her stern to port.

Q. Can that be compensation by the use of the rudder? A. No.

Q. And how long approximately would it take under the conditions that existed to bring the vessel to a halt by the use of full speed astern? A. About five minutes.

Q. Will you testify whether or not the use of full speed astern—I withdraw that question—will you testify now as to just how long under the conditions then existing you could safely have used full speed astern? A. Not more than a minute.

Q. What would have happened under the conditions then existing had you used it for longer than that? A. The vessel would have canted to starboard. The bow would have hit the pier on one side, and, as she continued to make headway through the pier, the stern would have gone over to the port and the rudder and propeller would be in (44) danger of striking the pier on the other side.

* * *

(49) Q. Will you tell us whether or not the conditions of wind and tide, and I believe we have already found that the tide was coming in and the wind was southeast and squally, will you state whether or not those conditions would have any affect on your ability to maintain steerageway in the channel? A. Yes.

Q. To what extent, sir? A. To the extent that the vessel would have to be travelling at a sufficient speed to maintain her position in the channel to line up correctly for passing through the bridge and a speed that would give her sufficient steerageway to maintain her position.

Q. Is there any peculiar navigational conditions that exist in the draw of a bridge in a river such as that at that time? I believe that can be answered yes or no. A. Yes.

Q. What is that condition? A. That it is preferable—or rather essential, in order to maintain the ship in the

middle of the draw, that the engine be going ahead so as to give the maximum response to the rudder movements.

(50) Q. Is there any particular condition in the water or current of the river which is created by the existence of the piers of the bridge? A. There would be a tendency for there to be, in the particular case where we had the tide coming in, for the water to be running a bit faster than it would in a wider part of the river.

Q. Faster where? A. Against the ship, running to the north.

Q. In the draw, you mean? A. Yes.

* * *

(138) (Books marked Exhibits P-10 and P-11 in evidence.)

* * *

WALFRID WAXIN, called as a witness in behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Julian:

Q. What is your address, Captain Waxin? A. 539 85th Street in Brooklyn.

Q. What is your occupation? A. I am a tugboat captain.

(146) Q. Who is your employer? A. Moran Towing and Transportation Incorporated.

Q. Captain, would you tell the Court what licenses and what pilot that you hold? A. Well, I have a pilot license, 500 tons, for all of New York harbor, including Jamaica Bay and Raritan Bay, Staten Island Sound, Newark Bay, Hudson River to Troy of Buzzard's Bay, Cape Cod Canal, Cape Cod Bay, Boston Bay, and all of Greater Boston Harbor.

Q. When did you first start tugboating? A. 1937.

Q. When did you first become captain of the tugboat? A. I got my original license in 1941 and went into the pilothouse at that time.

Mr. D'Auria: Went into what?

The Court: Pilothouse.

Mr. D'Auria: What?

The Court: That is the little place where the little wheel is on the tug.

Q. On December 20, 1957, I understand you were employed by Moran Towing, is that right? A. That's right.

Q. What was your tug, the name of your tug? A. The name of the tug that I was on at that time was the (147) Kathleen E. Moran.

Q. Do you remember on that day assisting and undocking the Lembulus? Did your tug assist in the undocking of the Lembulus? A. The tug did assist in undocking the Lembulus.

Q. That was at Kearny Point? A. At Copper's Coke is the departure point.

Q. Well, after the Lembulus was undocked and proceeded seaward down the Hackensack River, would you tell us what your tug did? What did you do with your tug? A. After the ship was turned around and headed downstream, we followed the ship down toward the Pulaski Skyway and Lincoln Bridge.

Q. On that trip down the Hackensack River, was there a collision? A. Yes.

Q. What time was that collision? A. I have a notation that it is 1555 in my little book.

Q. You mean you used something to refresh your recollection? A. Yes. I have a notation of it in my little day book.

Q. Would you produce that, please.

Captain, what is that document that you have in your hand? A. That is a diary.

(148) Q. Your personal diary? A. That is my personal book.

Q. And from that diary—when did you write that entry in there? A. That entry is written on Friday, December the 20th, in 1957.

Q. The collision that you refer to and mentioned as being at 1555, was that the Lincoln Highway bridge?

Mr. D'Auria: Your Honor, I am going to object to any leading question.

The Court: All right; don't lead. Objection sustained to the form of the question. Reframe it. Where was that collision?

Q. Where was the collision? A. The Lembulus hit the Lincoln Highway bridge and bent two masts.

Q. Did you see the collision yourself? A. Yes.

Q. Just before the collision, had you seen the bridge rising, going up? A. Yes, I had.

Q. Will you tell the Court what you saw? A. I saw the bridge start to rise to what appeared to me to be in the usual fashion of bridges rising. Then to slow down to such an extent that it was hard to tell whether the bridge (149) was still rising or had stopped.

Q. Captain, did you, as you followed the Lembulus down, were you on the port, starboard side, or directly astern? A. Following the Lembulus down, we stayed behind the Lembulus.

The Court: May I interrupt you a moment? Captain Waxin——

The Witness: Yes, your Honor.

The Court: —when you observed this bridge slowing to a degree which made it difficult or impossible for you to tell whether it was still rising or it had stopped, were you in a position to tell us—are you in a position to tell us how far north of the drawbridge section of the bridge the bow of the Lembulus was?

The Witness: That's very difficult to tell or judge that; but I'd say perhaps a ship length.

The Court: All right, go ahead.

Q. As you followed the Lembulus down, could you see her propeller as it turned? A. Yes.

Q. Would you tell the Court what, if anything, you saw the propeller do? A. Well, as we approached the bridge, it was evident that the opening procedure was slowing down. I noticed that the wheel of the Lembulus went into reverse. At that time, we went by the starboard quarter and up alongside of the Lembulus (150) on the starboard side.

Q. Well, at that time when you saw the wheel go into reverse, would you estimate in the same fashion as before, for the Court, how far away was the Lembulus at that time? A. Well, I would say that was just about the time or shortly after; so it must be just perhaps a little bit less than boat-length, say 350 feet or so.

Q. Did you observe the speed of the Lembulus as she approached the Lincoln Highway bridge? A. At that time, it seemed to me moving very slowly, but I wouldn't guess any actual speed.

Q. Well, from your experience as a pilot, and a tug-boat captain, would you say there was anything unusual about the speed of the Lembulus as she approached the Lincoln Highway bridge? A. Not at all.

The Court: How far out of water was her screw at the time you noticed it going in reverse?

Excerpts from Deposition of C. Peschken, Read into Record

The Witness: I don't know, your Honor, whether the screw was out of the water or not. I just noticed the commotion of the water.

Mr. Julian: Your witness.

* * *

Mr. McCarter: These are photographs—

Mr. D'Auria: No objection, sir.

The Court: All right.

Mr. McCarter: These are photographs taken of and in the bridgehouse. I would suggest they be marked as one exhibit, perhaps labelling them A, B, C, and D.

The Court: I guess.

(177) (Marked in evidence P-13-A, B, C, and D.)

* * *

Now reverting to the cross examination of Mr. Peschken at line 9, page 66:

"Q. Mr. Peschken, I have had handed to me a mimeographed booklet, which I understand is a Book of Rules and Regulations of the New Jersey Highway Department Drawbridges, consisting of 12 pages. I show this to you and ask you whether or not you can identify it?

"A. I do.

"Q. What is it?

"A. It is a book of rules and regulations.

(179) "Q. Just what I said, in other words?

"A. Yes.

"Mr. McCarter: Will you mark that, please, Mr. Reporter.

"(Above-mentioned Book of Rules and Regulations was received and marked Exhibit P-5 for identification.

* * *

"Q. Now, I am on a page which is numbered 8 of this Book of Rules and Regulations, and this is entitled 'Rules Governing Procedure in Opening and Closing Drawbridges' and I note that rule 2 states, 'If opening is delayed abnormally due to traffic conditions or to failure of equipment, the signal of two blasts to be repeated at intervals until the draw can be moved.'

* * *

"Q. Now, you have testified, Mr. Peschken, that (193) you did not at the time of this accident give the three-blast signal on starting to open the span, and you also testified that instead you did in fact give a two-blast signal. Is that your customary procedure whenever you operate the drawbridge?

"A. Yes.

"Q. I couldn't hear your answer.

"A. It is.

"Q. So that there was nothing abnormal at all about your procedure in this particular case?

"A. Not a thing."

* * *

(299) Q. I think I have had my answer. Now, you also testified at that prior discovery proceeding, did you not, sir, that the procedure you followed with respect to the approach of the Lembulus was completely normal in every respect? A. That's right.

* * *

(248) JERRY IANNACCONE, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. D'Auria:

Q. Mr. Iannaccone, what is your address? A. 15-01 George Street in Fair Lawn, New Jersey.

Q. And you are employed by the State of New Jersey, sir? A. That's right.

Q. In what capacity? A. District Electrical Supervisor.

Q. Were you notified about any electrical difficulty on the Hackensack or Lincoln Bridge? A. I was.

Q. Can you say that that was sometime before December 20th?

Mr. McCarter: I object to this leading question.

The Court: Yes, objection sustained. Don't lead.

Reframe it.

Q. About what time were you notified? A. Well, I can't recall exactly, but I was notified, I believe twice that there was some sort of trouble on that bridge.

Q. Can you tell us the year and the month? A. It was prior to December 20th of that year.

Q. 1957? A. That's right.

Q. Did you go to that bridge as a result of a call that (249) there was electrical difficulty? A. I did.

Q. Can you tell us what it was, sir; what the difficulty was?

The Court: Shall we find the time first? Can you fix the time when he went there.

Q. Can you tell us when you went? A. At the time, I couldn't tell, because whenever I went there and made an investigation, we made the test and we couldn't find anything. We tested the bridge at full speed and there wasn't any trouble. It was an intermittent trouble that didn't seem

to appear when we were there. We did find the trouble subsequently, after this vessel struck the bridge.

* * *

(250)

Q. Mr. Iannaccone, can you tell me just what this difficulty was and what was causing it? A. Well, at the time, I said I couldn't tell then. But now we know; and, of course, it's been corrected. It was in the control of the bridge; it was in the leveling control mechanism. The bridge has a leveling mechanism which keeps the bridge level, and if it goes out of level too much, it automatically stops the bridge.

* * *

Q. Now, at this three point power, which you say is 35 to 45 per cent of full speed, can you tell us approximately how long it would take, at that rate of speed, to lift the bridge from its traffic position to its full height, or the almost open height, rather? A. Well, I can't tell you exactly, but I could approximate it.

Q. Do your best. A. About four minutes, I believe.

Q. Are you aware that the Coast Guard puts out a publication known as "Notice to Mariners," which contains warning of any dangerous or potentially dangerous obstacles to navigation in the channel? A. No, I don't.

(256) Q. Do you know whether or not any report was made to the Coast Guard as to this potentially dangerous situation on your bridge? A. We didn't think it was dangerous.

Q. So far as you were concerned, you were the person who has the responsibility, I take it, of making that decision? A. That's right.

* * *

Q. Who would have the duty to report to your superior? A. I would.

Q. Did you so report? A. I reported that there was some sort of trouble there.

Q. And did you make a written report? A. No, I didn't.

Q. Is there any written report, to your knowledge, of this trouble? A. No, by me.

Q. By anybody? A. Well, I don't know if the bridge tenders report directly (260) but I didn't report it directly.

Q. You never made any— A. No.

Q. And none were made by your subordinates pursuant to your directions? A. Not that I know of.

Q. You say you did make a report to your superior. Do you remember when that was? A. No. It was a telephone conversation.

Q. Do you remember approximately when it was with reference—— A. Well, it was in that period before this accident occurred, about two or three weeks, that I was so notified.

Q. It was in that two or three week period? A. Yes.

Q. I see. Do you remember the nature of your report? A. I just told him there was some sort of—it was reported to me there was some sort of control trouble there, and every time I went there, I couldn't find it.

* * *

Q. And you felt it sufficiently important to make an order of that nature to him, but you did not feel it sufficiently important to advise the Coast Guard? Or give any other notice to vessels which were going to navigate that channel? A. That's right.

(269) Q. Is it your custom to give orders such as that without having any confirmation made in writing? A. That's right.

* * *

(271)

Q. No matter what kind of operation you used, whether emergency or regular, to open this bridge, I take it that ten minutes would be more than ample in any case to raise it to the nearly open limit, is that correct? A. You mean the time to open the span?

Q. Yes. A. Yes, ten minutes would be ample for both.

Mr. McCarter: All right, that is all.

* * *

Q. I show you Plaintiff's Exhibit 13-C, and ask you whether or not you recognize that? A. I do.

Q. What is it? A. That is notice of regulations that is tacked on the bridge.

Q. Was that there on December 20, 1957? A. It was.

Q. And that is, is it not, right in front of your operator's booth? A. Yes, it is.

Q. And rule 3 states, does it not, Mr. Peschken, "On vertical bridges, three blasts of the siren are to be given (four blasts for Government craft) when the span starts to rise", and so on; is that not true, sir? (288) A. That's right.

Q. And you testified that, in fact, you do not observe that regulation as a matter of course? A. That's right.

Q. Of course, it does say, does it not, down at the botton of this, in red letters, "Violation of any of them"—that is,

the rules—"shall be cause for disciplinary action." You are aware of that, sir? A. I am.

Q. And you take that risk nevertheless? A. Yes.

* * *

Q. And it is true, is it not, Mr. Peschken, that in this particular situation you did, in fact, start to lift the bridge earlier than you normally do for vessels approaching from the north? A. Did you say I did or didn't.

Q. Did, in fact? A. I did?

Q. Yes. A. Yes.

(296) Q. So that you had more than the normal time within which to complete the lifting operation, is that not so? A. That's right.

The Court: Was this emergency method of lifting the draw span electrical in character?

The Witness: That is right.

The Court: Separate systems?

The Witness: Separate systems.

The Court: Was that available for use that particular afternoon?

The Witness: It was.

* * *

APPENDIX I

Exhibit P 10 in evidence, record page 138. Captain Hawkin's Accident Report.

To Dept.: Nautical. M. S. "Lembulus".

Office Ref.: Port: New York.

Subject: Damage to fore & main topmasts. Date: 21st, December '57.

Enclosures:

Messrs. Shell Tankers Limited,
Ibex House,
Minories,
London. E. C. 3.

Dear Sirs.

I regret having to report that this vessel suffered damage to the fore and main topmasts whilst passing under the Lincoln Highway Bridge, Hackensack River, New York, at 1557 hours on the 20th, December 1957.

The "Lembulus" was outward bound from Koppers Wharf, Kearney Point, where she had completed discharging asphalt and, was ballasted to a draft of 13' 00" forward and 17' 00" aft. The tugs Catherine Moran and Pauline M. Moran were in attendance and the vessel was being piloted by Captain Basset, one of the senior pilots of the Moran Tug Boat Company. The weather conditions at the time were, fresh to strong squally southeasterly wind with frequent heavy rain showers.

From the time of leaving the berth four bridges had been safely negotiated and, on passing under City Bridge at

1546 hours the Pilot made the customary whistle signal to the Operators on Lincoln Bridge indicating that he wished to pass. They in turn answered with their signal indicating that they were in the process of lifting the bridge and, it was observed that they were in fact doing so.

The vessel continued her approach to Lincoln Bridge, being conned to pass midway between the piers, the bridge was continuing to rise and everything seemed to be proceeding normally. At 1555 hours it was noticed that the bridge had stopped rising and A movement of Dead Slow Ahead which had just been made was immediately followed by, Stop. At 1556 hours the vessel was in an impossible position right in the approach to the bridge before we began to have doubts of the masts clearing, and full speed astern was rung on the engines in an attempt to take the way off. This movement was followed by, Stop, (not recorded in the Bridge Movement Book) and immediately afterwards by, Emergency Full Speed Astern. The foretopmast hit the bridge at this time and a few moments later the main topmast hit too. After the foretopmast hit, the bridge resumed rising and continued to apparently rise to the fully lifted position after we had passed through. At 1603 it was noted that the bridge had been fully lowered to the closed position. The foretopmast hit the bridge about six feet below the truck and the main topmast about four inches below the truck. These figures were quoted in the Official Log Book Entry, made after the accident but, when the masts were removed in the repair yard the measurements were found to be nine feet ten inches and six inches respectively.

The foretopmast was badly bent just above the housing to an angle of about twenty-five degrees from the vertical and was further bent at a distance of nine feet

ten inches from the truck. The main topmast was bent backwards to a similar degree at a distance of four feet below the truck. The cowl on the gas line on the mainmast was knocked off. The foretopmast stay has been badly stretched but all other rigging appears to be undamaged.

Regarding the stop in the raising movement of the bridge, it may be that there was some temporary mechanical fault in the lifting mechanism but, at no time did the bridge Operators give any indication that there was anything amiss. The bridge is fitted with a warning whistle for such emergencies.

As soon as was practicable after the accident I contacted the Agents, Messrs. Furness Withy, and instructed them to advise Captain Baker-Beal and Messrs. Bethlehem Steel Corp. and to arrange for representatives of the Repair Yard to board as soon as possible after we arrived at St. George Anchorage. These messages were passed by Radio Telephone through the courtesy of the Captain of the tug, Catherine Moran.

The vessel continued down river without further incident and anchored at 1805 hours in a position with Fort Wadsworth Light bearing 166 degrees distant 1.8 miles.

I went ashore by tug after anchoring and gave Captain Baker-Beal the details of the accident and found that he had received my messages and had completed arrangements as requested. The vessel was scheduled to proceed to the repair yard at Staten Island at 1300 hours on the 21st. December.

I shall tender a full report on the repair proceedings as soon as possible.

I am.

Yours faithfully

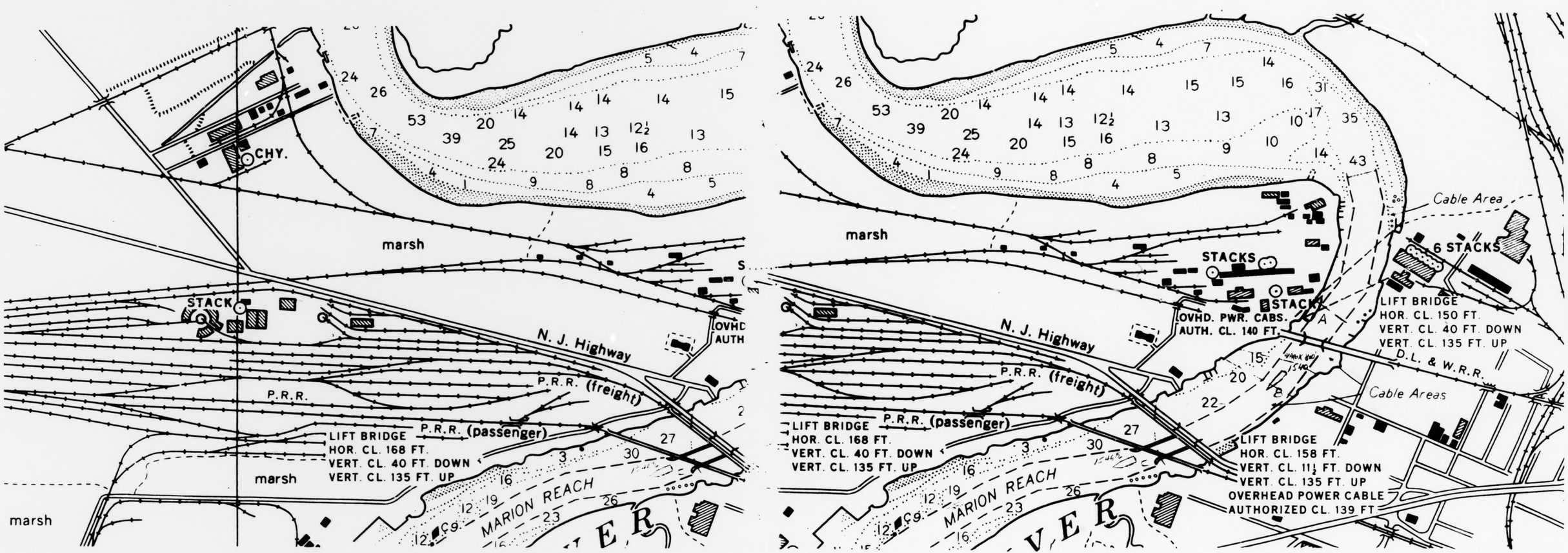
W. A. HAWKINS
(W. A. Hawkins)
Master.

Locations. Admiralty Chart No. 2580.
Berth. 40deg.44.8N, 74deg.4.6W.
Lincoln Bridge. 40deg.43.65N, 74deg.5.9W.

cc. Capt. A.C.C. Baker-Beal, Asiatic Pet. Corp., New York.
Mr. Robert M. Julian, representative from Messrs. Haight, Gardner, Poor & Havens, 80 Broad Street, New York 4, N. Y.

APPENDIX J

Exhibit P 2 in evidence, record page 8. An enlarged portion of a United States Coast and Geodetic chart relating to the Hackensack River upon which Captain Hawkins made various schematic markings showing the approximate location of the LEMBULUS at various times.


CHY.
marsh
STACK
N. J. Highway
P.R.R.
P.R.R. (freight)
P.R.R. (passenger)
LIFT BRIDGE
HOR. CL. 168 FT.
VERT. CL. 40 FT. DOWN
VERT. CL. 135 FT. UP
marsh
MARION REACH
marsh
OVHD
AUTH
STACKS
STACK
OVHD. PWR. CABS.
AUTH. CL. 140 FT.
Cable Area
6 STACKS
LIFT BRIDGE
HOR. CL. 150 FT.
VERT. CL. 40 FT. DOWN
VERT. CL. 135 FT. UP
D.L. & W.R.R.
Cable Areas
LIFT BRIDGE
HOR. CL. 158 FT.
VERT. CL. 11½ FT. DOWN
VERT. CL. 135 FT. UP
OVERHEAD POWER CABLE
AUTHORIZED CL. 139 FT


STACKS
General Pulaski Skyway
FIXED BRIDGE
HOR. CL. 300 FT.
VERT. CL. 135 FT.
marsh
LIFT BRIDGE
HOR. CL. 201 FT.
VERT. CL. 35 FT. DOWN
VERT. CL. 135 FT. UP
HACKENSACK
Pipeline and Cable Area
Lincoln Highway
Marion
Cemetery